# TO ESTABLISH A COMMISSION TO STUDY THE FEDERAL COURTS

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

## S. 675

A BILL TO ESTABLISH A FEDERAL JURISDICTION REVIEW AND REVISION COMMISSION

AND

## S. 1530

A BILL TO ESTABLISH A FEDERAL COURTS STUDY COMMISSION AND A FEDERAL COURTS ADVISORY COUNCIL ON THE FUTURE OF THE JUDICIARY

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# TO ESTABLISH A COMMISSION TO STUDY THE FEDERAL COURTS

WEDNESDAY MAY 12, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The committee met, pursuant to notice, at 10:05 a.m., in room 357, Russell Senate Office Building, Senator Howell Heflin (acting chairman of the committee) presiding.

Present: Senators Heflin and Baucus.

Staff present: Laurie McBride, counsel; Arthur Briskman, minority counsel; Paula Argento, minority counsel; Anne Land, staff member; Jose Zavala, staff member; Pete Velde, chief counsel, Subcommittee on Courts.

## OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. I believe we will come to order.

I am going to ask, if you will, our witnesses today—Judge Clifford Wallace, Judge Robert Vance, Professor Meador, George Williams, and Professor Abernathy—if you will all just come to the table, we will do this more informally and we can make presentations. If we will all just be seated, since we have five witnesses, we can all be at the table and have some interchange on ideas.

Today, the Senate Judiciary Committee will consider Senate bill 675 and Senate bill 1530, two bills addressed to studying and solving the problems which will face our Nation's judiciary now and in the future. I would like to recognize the great leadership of Chief Justice Warren Burger in drawing attention to the need for change and revision at every level of our judicial system. I would also like to thank Chairman Thurmond for his focus on this area on the Judiciary Committee.

There is no doubt that an orderly and effective administration of justice is key to insuring the life, liberty, and happiness of all Americans. Our constitutional freedom is premised on certain assumptions, and one is the idea that the court system will serve the needs of the people. We cannot be free when our courts are so backlogged that criminals are never brought to justice and are set free to terrorize the people again. We cannot be free when intercircuit conflict and backlogs of cases prevent the orderly enforcement of our most basic Federal and constitutional rights. We also cannot be free when we lose sight of the rights and needs of our localities.

It is no secret to this committee, to Congress, and to the public that our present allocation of judicial resources needs some rework-

ing. Some, in desperation, may voice the view that we should haphazardly attack the symptoms of judicial disorder to achieve some immediate, yet fleeting solutions. Others encourage a more cautious, thorough, and lasting approach—an approach which will carry us through the turn of the century and beyond.

Today, we will look at two proposals that are based on such a concept. S. 1530 embraces the idea of a temporary legislative commission to study and develop a long-range plan for both the future of the judiciary and court jurisdiction. It then establishes a permanent Federal council to oversee and implement those recommendations.

S. 675 also establishes a temporary legislative commission to study one aspect of our present judicial confusion—the issue of Federal court jurisdiction. This area is certainly one of great importance, and it is appropriate that Congress consider ways to make improvements as part of its duty under article III of our Constitution.

The great Chief Justice John Marshall has written that our Constitution is "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."

The greatness of our Nation's judiciary will depend on our ability to determine our future needs and revise our judicial system in line with our constitutional principles.

Now, let me further, as a preface for this hearing, give a little bit more of a background. The bill, S. 675, is an idea that I think has come about pertaining to the jurisdiction of the Federal courts with State courts and a study on the long range pertaining to those, with the idea that there is a need for looking at this anew.

The concept of S. 1530, really, I suppose, had its origin when Chief Justice Burger asked Judge Clifford Wallace if he would look toward the future and where the court system would be by the year 2000. Judge Wallace went out and interviewed a great number of people in the judicial area—lawyers, judges and other people.

Judge Wallace, after spending a great deal of time, prepared a document and presented this to the Brookings Institute conference at Williamsburg, which is a conference between the judiciary, the legislative branch and the executive branch which is held each year. From this, he developed ideas that are really articulated in this S. 1530.

Now, I am going to have to leave; we have got a vote on. I will have to come back, and we will have to recess. But that is sort of a background of where we are. We have some outstanding witnesses today. Prof. Daniel Meador, of course, was in the Department of Justice and worked with planning for the judiciary toward the future. Of course, he has had a long career studying comparative judicial systems, spent time in England, and has probably as fine a background as any one person in America for the overall comparison of the American judicial system.

Judge Wallace is here; George Williams, who is the executive director of the American Judicature Society and is a former president of American University here in Washington, D.C., and has been interested in judicial administration; Judge Robert Vance, who is on the eleventh circuit and who was an outstanding lawyer

before he went on the bench. I think you need a person with a background who was in the arena of the practice both in the Federal and the State courts for many years, and Judge Vance has exceptional experience in both. He has also had a great deal of experience pertaining to structures of organizations. He reorganized the Democratic Party when he was chairman of the Democratic Executive Committee, and has looked toward the idea of managerial pragmatism and has had a background in that, which I think can be helpful.

Prof. Charles Abernathy, whom I am not as familiar with but who comes to us highly recommended, is a professor of law from Georgetown University.

So, while I am going to vote, if you all will get to know each other better, then when we come back, we can get into this more in detail. So, if you will excuse me, I will be right back.

[Whereupon, a brief recess was taken from 10:13 a.m. until 10:33 a.m.]

Senator HEFLIN. We will get started. I hope we do not have too many interruptions, but from what we heard on the floor, there probably will be. Before we begin I wish to place copies of S. 675 and S. 1530 in the record.

[Text of bills follow:]

II

97TH CONGRESS
1ST SESSION

# S. 675

To establish a Federal Jurisdiction Review and Revision Commission.

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IN THE SENATE OF THE UNITED STATES

MARCH 10 (legislative day, FEBRUARY 16), 1981

Mr. THURMOND (for himself, Mr. HEFLIN, Mr. DECONCINI, Mr. SIMPSON, and Mr. EAST) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To establish a Federal Jurisdiction Review and Revision Commission.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Jurisdiction Review and Revision Commission Act".

ESTABLISHMENT AND PURPOSE OF THE COMMISSION

SEC. 2. (a) ESTABLISHMENT AND PURPOSE.—There is established a Federal Jurisdiction Review and Revision Commission (hereafter in this Act referred to as the "Commis-

sion"). The Commission shall study the jurisdiction of the courts of the United States and of the several States, and shall report to the President and the Congress on the revisions, if any, of related provisions of the Constitution and laws of the United States which the Commission deems advisable on the basis of such study.

MEMBERSHIP OF THE COMMISSION

SEC. 3. (a) NUMBER AND APPOINTMENT.—The Commission shall be composed of sixteen members appointed, within 90 days from the date of enactment, as follows:

(1) Four members appointed by the President of the United States.

(2) Four members of the Senate appointed by the President pro tempore of the Senate, two of whom shall be appointed upon the recommendation of the majority leader and two of whom shall be appointed upon the recommendation of the minority leader.

(3) Four members of the House of Representatives appointed by the Speaker of the House of Representatives, two of whom shall be appointed upon the recommendation of the majority leader and two of whom shall be appointed upon the recommendation of the minority leader.

(4) Four members appointed by the Chief Justice of the United States.

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(b) REPRESENTATION OF VARIED INTERESTS.—The membership of the Commission shall be selected in such a manner as to be broadly representative of the various interests, needs, and concerns which may be affected by the jurisdiction of Federal and State courts.

(c) TERM OF OFFICE AND VACANCIES.—The term of office of each member shall be for the life of the Commission. Vacancies in the Commission shall not affect its powers, but shall be filled in the same manner in which the original appointment was made.

(d) CHAIRMAN AND VICE CHAIRMAN.—The Commission shall select a Chairman and a Vice Chairman from among its members.

(e) QUORUM.—Eight members of the Commission shall constitute a quorum.

COMPENSATION OF MEMBERS OF THE COMMISSION

SEC. 4. (a) FEDERALLY EMPLOYED MEMBERS.—A member of the Commission who is an officer, or full-time employee, of the United States shall receive no additional compensation for his or her services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission, but not exceeding the maximum amounts authorized under section 456 of title 28, United States Code.

(b) OTHER MEMBERS.—A member of the Commission from the private sector shall receive $200 per diem for each day (including traveltime) during which he or she is engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties, but not in excess of the maximum amounts authorized under section 456 of title 28, United States Code.

POWERS OF THE COMMISSION

SEC. 5. (a)(1) HEARINGS.—The Commission or, on the authorization of the Commission, any subcommittee thereof may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, administer such oaths, and require, by subpena or otherwise, the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memorandums, papers, and documents as the Commission or such subcommittee may deem advisable. Subpenas may be issued under the signature of the Chairman or Vice Chairman, or any duly designated members, and may be served by any person designated by the Chairman, the Vice Chairman, or such member.

(2) In case of contumacy or refusal to obey a subpena issued under paragraph (1) of this subsection, any district court of the United States or the United States court of any

possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is being carried on or within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business, upon applications by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a subcommittee thereof, to produce evidence if so ordered, or to give testimony touching the matter under inquiry; and failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) OFFICIAL DATA.—Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, shall furnish to the Commission, upon request made by the Chairman or Vice Chairman, such information and assistance as the Commission deems necessary to carry out its functions under this Act, consistent with applicable provisions of law.

(c) ADMINISTRATIVE POWERS.—Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in

the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title, and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $200 a day for individuals.

(d) CONTRACTING AUTHORITY.—The Commission is authorized to enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

(e) NONGOVERNMENTAL ASSISTANCE.—The Commission is authorized to receive financial assistance from sources other than the Federal Government, including assistance from private foundations.

FINAL REPORT

SEC. 6. The Commission shall transmit to the President and to the Congress, not later than two years after the first meeting of the Commission, a final report containing a detailed statement of the findings and conclusions of the study conducted by the Commission under section 2, together with

such recommendations as it deems advisable. The Commission may also submit interim reports prior to submission of its final report.

EXPIRATION OF THE COMMISSION

SEC. 7. Ninety days after the submission to Congress of the final report provided for in section 6, the Commission shall cease to exist.

AUTHORIZATION OF APPROPRIATIONS

SEC. 8. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 9. This Act shall take effect October 1, 1981.

II

97TH CONGRESS
1ST SESSION

# S. 1530

To establish a Federal Courts Study Commission and a Federal Courts Advisory Council on the Future of the Judiciary.

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IN THE SENATE OF THE UNITED STATES

JULY 29 (legislative day, JULY 8), 1981

Mr. HEFLIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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# A BILL

To establish a Federal Courts Study Commission and a Federal Courts Advisory Council on the Future of the Judiciary.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "Permanent Federal Courts Study Act".

ESTABLISHMENT AND PURPOSE OF THE COMMISSION AND THE COUNCIL

SEC. 2. (a) ESTABLISHMENT.—There is hereby established a Federal Courts Study Commission and a Federal Courts Advisory Council on the Future of the Judiciary.

(b) PURPOSE OF COMMISSION.—It is the purpose of the Commission to—

(1) develop a long-range plan for the future of the judiciary by collecting and reviewing all private and public studies on the effectiveness of the courts studying the jurisdiction of the United States courts and assessing—

(A) alternative methods of dispute resolution;

(B) the actual structure of the Federal court system;

(C) the manner in which courts handle cases;

(D) methods of intracircuit and intercircuit court of appeals (conflict resolution); and

(E) the types of disputes resolved by the Federal courts; and

(2) study the jurisdiction of the courts of the United States, and to report to the President and the Congress on the revisions, if any, of related provisions of the Constitution and laws of the United States

which the Commission deems advisable on the basis of such study.

(c) PURPOSE OF THE COUNCIL.—It is the purpose of the Council to—

(1) act as a permanent body, authorized to oversee Federal court jurisdiction review and proposed revisions;

(2) stimulate the evaluation of and provide an eventual solution to problems currently facing the courts;

(3) review the findings of the legislative study group;

(4) order, receive, and review reports from all dispute resolving bodies, including courts, administrative agencies, Federal Justice Centers; and

(5) afford continuity and uniformity to the ongoing study of the judiciary.

MEMBERSHIP OF THE COMMISSION AND THE COUNCIL

SEC. 3. (a) MEMBERSHIP OF COMMISSION.—The Commission shall be composed of fourteen members appointed, within ninety days after enactment of this Act, as follows:

(1) four members appointed by the President of the United States with two members from each of the two major political parties;

(2) two members of the Senate appointed by the President pro tempore of the Senate, one of whom shall be appointed upon recommendation of the majority leader and one of whom shall be appointed upon recommendation of the minority leader;

(3) two members of the House of Representatives appointed by the Speaker of the House of Representatives, one of whom shall be appointed upon recommendation of the majority leader and one of whom shall be appointed upon recommendation of the minority leader;

(4) four members appointed by the Chief Justice of the United States with no more than two of such members from either of the two major political parties; and

(5) two members appointed by the Conference of Chief Justices, with no more than one member being from either of the two major political parties.

(b) MEMBERSHIP OF COUNCIL.—The Council shall be composed of twelve members, representing each of the three branches of the Federal Government, appointed, within ninety days after the date of enactment of this Act, as follows:

(1) four members appointed by the President of the United States with two members from each major political party;

(2) two members of the Senate appointed by the President pro tempore of the Senate, one of whom shall be appointed upon recommendation of the majority leader and one of whom shall be appointed upon recommendation of the minority leader;

(3) two members of the House of Representatives appointed by the Speaker of the House of Representatives, one of whom shall be appointed upon recommendation of the majority leader and one of whom shall be appointed upon recommendation of the minority leader; and

(4) four members to be appointed by the Chief Justice of the United States with no more than two of such members being from either of the two major political parties.

(c) REPRESENTATION AND VARIED INTERESTS.—The membership of both the Commission and of the Council shall be selected in such manner as to be broadly representative of the various interests, needs, and concerns which may be affected by the jurisdiction of the Federal courts.

(d) TERM OF OFFICE AND VACANCIES ON COMMISSION.—The term of office of each Commission member shall be for the life of the Commission. Vacancies in the Commission shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

(e)(1) TERMS OF OFFICE AND VACANCIES ON THE COUNCIL.—Except as provided in paragraph (2) of this subsection, the term of office of each Council member shall be for five years. A vacancy in the Council shall not affect its powers, and shall be filled in the same manner in which the original appointment was made.

(2) One-half of the members of the Council first appointed pursuant to subsection (b) of this section shall be appointed for a term of three years.

(f) CHAIRMAN AND VICE CHAIRMAN.—The Commission shall select a Chairman and a Vice Chairman from among its members.

(g) QUORUM.—Eight members of the Commission shall constitute a quorum. Seven members of the Council shall constitute a quorum.

POWERS OF THE COMMISSION

SEC. 4. (a) HEARINGS.—(1) The Commission and Council or, on the authorization of the Commission or Council, any subcommittee thereof may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, administer such oaths, and require, by subpena or otherwise, the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memorandums, papers, and documents as the Commission, Council, or such subcommittee

may deem advisable. Subpenas may be issued under the signature of the Chairman or Vice Chairman, or any duly designated members, and may be served by any person designated by the Chairman, the Vice Chairman, or such member.

(2) In case of contumacy or refusal to obey a subpena issued under paragraph (1) of this subsection, any district court of the United States, or the United States court of any possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is being carried on or within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business, upon applications by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or Council, or a subcommittee thereof, to produce evidence if so ordered, or to give testimony touching the matter under inquiry. Failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) OFFICIAL DATA.—Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, shall furnish to the Commission or Council, upon request made by the Chairman or Vice Chairman, such information and assistance as the Commis-

sion or Council deems necessary to carry out its functions under this Act, consistent with applicable provisions of law.

(c) ADMINISTRATIVE POWERS.—Subject to such rules and regulations as may be adopted by the Council or Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title, and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $200 a day for individuals.

(d) CONTRACTING AUTHORITY.—Both the Commission and Council are authorized to enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

(e) NONGOVERNMENTAL ASSISTANCE.—The Commission and Council are authorized to receive financial assistance from sources other than the Federal Government, including assistance from private foundations.

FUNCTIONS AND DUTIES

SEC. 5. (a) COMMISSION.—The Commission shall—

(1) make a complete study of the jurisdiction of the courts of the United States and report to the President and the Congress on such study;

(2) recommend revisions to the Constitution and laws of the United States as the Commission deems advisable on the basis of such study;

(3) collect and review studies on the effectiveness of the courts;

(4) develop a long-range plan for the judicial system; and

(5) submit a written report to the Council two years after its first meeting and at least one interim report within the first year after its first meeting.

(b) COUNCIL.—The Council shall—

(1) review the findings of the legislative study group;

(2) provide continuity to and oversee the ongoing study of the judiciary; and

(3) submit a written report to the President and the Congress on the findings of the Commission, containing recommendations and conclusions, within six months after receipt of the Commission's report, and make annual reports to the President on the condition of the judiciary and summarize any findings, make any recommendations and conclusions it deems advisable every year thereafter.

COMPENSATION OF MEMBERS

SEC. 6. (a) FEDERALLY EMPLOYED MEMBERS.—A member of either the Commission or the Council who is an officer, or full-time employee, of the United States shall receive no additional compensation for his or her services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission, or the Council, as the case may be, but not exceeding the maximum amounts authorized under section 456 of title 28, United States Code.

(b) OTHER MEMBERS.—A member of either the Commission or the Council who is from the private sector shall receive $200 per diem for each day (including traveltime) during which he or she is engaged in the actual performance of duties vested in the Commission, or the Council, as the case may be, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such

duties, but not in excess of the maximum amounts authorized under section 456 of title 28, United States Code.

REPORTS

SEC. 7. (a) COMMISSION REPORT.—The Commission shall transmit to the Council, not later than two years after the first meeting of the Commission, a final report containing a detailed statement of the findings and conclusions of the study conducted by the Commission under section 2 of this Act, together with such recommendations as it deems advisable. The Commission shall submit an interim report not later than one year after the first meeting of the Commission and such other reports as they deem necessary.

(b) COUNCIL'S REPORTS.—(1) The Council, upon receipt and review of the Commission's final report, shall transmit a report to the President and the Congress, not later than six months after receipt of the Commission's report. Such report shall contain a detailed statement of its findings, conclusions and such recommendations as it deems advisable. The Council shall submit interim reports prior to the submission of the Commission's final report as they deem necessary.

(2) The Council shall, in keeping with its oversight function, make annual reports to the President on the condition of the judiciary and summarize any findings, make any recommendations and conclusions it deems advisable on the basis of its previous activities.

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EXPIRATION OF THE COMMISSION

SEC. 8. The Commission shall cease to exist on the date ninety days after the date it transmits the final report to the Council pursuant to section 6 of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 9. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 10. This Act shall become effective on October 1, 1981.

Senator HEFLIN. I believe we will start with Professor Meador. He has studied the question of Federal jurisdiction, which S. 675 is largely directed toward, and the relationship of Federal courts and State courts and the jurisdiction and the need for planning in regard to this as, certainly, we move toward the year 2000.

Dean Meador, we are delighted to have you and we would be delighted to hear from you at this time.

**STATEMENT OF A PANEL CONSISTING OF DANIEL J. MEADOR, JAMES MONROE PROFESSOR OF LAW, SCHOOL OF LAW, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA.; J. CLIFFORD WALLACE, JUDGE, NINTH CIRCUIT, U.S. COURT OF APPEALS, SAN DIEGO, CALIF.; ROBERT S. VANCE, JUDGE, ELEVENTH CIRCUIT, U.S. COURT OF APPEALS, BIRMINGHAM, ALA.; GEORGE H. WILLIAMS, EXECUTIVE VICE PRESIDENT AND DIRECTOR, AMERICAN JUDICATURE SOCIETY, CHICAGO, ILL.; AND CHARLES F. ABERNATHY, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.**

Professor MEADOR. Thank you, Mr. Chairman. I appreciate being asked to appear here. Let me say immediately that I endorse the general ideas and principles in both of these bills. I have submitted a written statement in writing that I assume will be received into the record of the hearing, and I will not repeat what is said there.

Senator HEFLIN. I have read it.

Professor MEADOR. Let me elaborate just for a few minutes on it and add one or two additional thoughts.

Looking back in historical perspective for a moment, I find the period we are in now and have been in for the last 15 years very similar to a period about 100 years ago. I think we have now, within the last 15 years, more changes within the Federal judiciary and more problems arising than at any time since that period 100 years ago—the period running roughly between 1875 and 1891.

In that period, there were enormous changes in legislation and the country's activities and Federal jurisdiction. You had the Supreme Court simply being overrun with cases, and for over 20 years there was an enormous national debate about what to do about it. All of that culminated in the creation of the U.S. courts of appeals in 1891.

We have a similar problem now, except much, much larger. Everything is much larger—the volume of the courts' business, the size of the judiciary, the country—all of that. For about the last 15 years, we have had numerous projects, studies, and efforts directed toward court problems. You start in the late 1960's with the American Bar Foundation work on the courts of appeals. You have the Freund committee under the Federal Judicial Center; the Advisory Committee on Appellate Justice; the Hruska Commission; a special Department of Justice committee set up by Attorney General Levy in 1976; and then studies and proposals out of the Office of Improvements for the Administration of Justice from 1977 onward.

In addition to that, there are numerous private research groups and individuals who have written and studied. There is a large array of data, ideas, and proposals directed to the Federal courts.

During the period, Congress has passed several pieces of legislation that have helped the problem, but have also contributed to the extent of the change. You have the creation of the Federal Judicial Center in the 1960's. You have the establishment of the Federal magistrate system; then the creation of the Hruska Commission by Congress. Then we come into the late 1970's and you get the bill enlarging the powers of magistrates; the Bankruptcy Reform Act; creation of new Federal judgeships. Then, in the 1980's, we get the Dispute Resolution Act, which has never been funded, but passed. Much more recently, you get the Federal Court Improvements Act, just signed by the President this April.

While Congress has passed a lot, there are many, many more proposals out there that have not received serious congressional attention. If you add up all of this work of the last 15 years and all of the problems and the changes in the system, it seems to me we are at a time when we need a device—a mechanism, if you will—that can pull together all the data, all the studies, all the ideas, and look at the problems in a comprehensive way and come up with some proposals to put the system on a better footing and to look ahead over the next two decades to see where it may be going and what lines of development the system ought to proceed along. We need to do that rather than let it just rock along willy-nilly, and occasionally hit episodically at this problem and that problem.

I believe that the kind of commission proposed in these two bills is the device best calculated to do the job. With all due respect to all the hard-working Members of Congress, they simply are unlikely to be able to find the time to sit down on their own or through their committee structure and pull together all of this data, and take a comprehensive, long-range look at the system.

I think Congress can use a commission to help it do that and then Congress, of course, will still reserve all of its rights to hear all the proposals through the committee system and debate them on the floor. But at least it will have a well-developed, carefully thought-out, comprehensive set of proposals and plans for the future. So, I heartily endorse the idea of a commission.

I think the idea of a permanent council is also sound. I think the system is changing so and the country is changing so quickly that you cannot sit down and make a one-time plan that will hold us for 20 years without taking another look at it. I think an annual stock-taking by a group specially assigned to that mission is a very good idea. So, I endorse that, too.

I would only add here that if it turns out that the proposal for the permanent council is controversial and if there are some hesitations about that, I urge the committee simply to sever that and move ahead with the commission so we can get something promptly going on that front.

Those, in essence, are my ideas. I would be happy to answer any questions or comment further as we go along.

[Prepared statement of Daniel J. Meador follows:]

STATEMENT OF

DANIEL J. MEADOR

JAMES MONROE PROFESSOR OF LAW
UNIVERSITY OF VIRGINIA

This testimony concerning S.675 and S.1530 is submitted at the invitation of the Subcommittee on Courts. I appreciate this opportunity to comment on these pending bills. They are both aimed at creating a means of assuring the effective functioning of the federal judiciary under changed and continually changing circumstances, a matter of great importance to the well-being of this nation and to government under law. In general, I support the concepts of the bills, and I believe that some amalgam of the two would be desirable. Rather than comment on details in the two bills, I will present my views as to the best means of accomplishing the bills' mutual objectives. These views, in the main, are in line with the provisions in the bills.

A Temporary Commission on the Federal Judiciary

Both bills would create a special commission with an active life of two years to study the federal judiciary, its jurisdiction, and other aspects of its structure, procedure, and business. I enthusiastically endorse the creation of such a commission.

Two circumstances combine to make a commission of this sort an almost essential step if the federal courts are to be kept in position to function effectively. One circumstance is that the federal courts have undergone substantial changes over the last two decades in their size, the nature of their business, their personnel, and their processes. These changes are the result of a near explosive growth in the volume of litigation and in the altered nature of claims being presented. The trends that have been at work for the last two decades continue, and they are not likely to abate. The federal judicial

system needs a careful and comprehensive review in order to determine what parts of it are functioning well and what are not and to recommend revamping, where appropriate, in its jurisdiction, structure, procedures, personnel, and administration. It would be irresponsible to allow the system simply to drift or to develop and evolve without direction.

The other circumstance is that the Congress because of the multitudinous demands pressing upon it relating to national defense, foreign affairs, taxation, appropriations, social services, and constituent caretaking simply has insufficient time to study in detail the workings of the federal judiciary and to develop comprehensive proprosals to cure deficiencies. Other issues of the day press in with much greater urgency and have influential constituencies calling for action. Yet, ultimately, it is the responsibility of Congress to provide for the judiciary and to govern its structure and jurisdiction. Given its limited time and very long agenda, it is entirely appropriate for Congress to discharge its responsibility through creating a commission to study the problems, to formulate proposals for improvement, and to report to Congress. Indeed, since Congress itself is unlikely to be able to do the job with sufficient throughness within a reasonable time, a commission seems to be the only effective way for this to be done.[1]

It is unnecessary here to rehearse in detail all of the aspects of the federal judiciary's operations that call for attention and possible revamping. They include the appropriate allocation of authority between state and federal courts, the appropriate powers and uses of non-Article III officials, the development of an appellate system that can maintain uniform legal doctrine and provide definitive precedents within a reasonable time, and institutional arrangements for effective administration of the judiciary.

Authority of the Commission. Legislation creating a commission of this sort should specify in broad terms its authority

and mission. It would be unwise for legislation to attempt to confine the commission to less than all aspects of the federal judiciary's contemporary functioning. The commission on the federal court appellate system (known as the Hruska Commission) created by Congress, which functioned from 1973 to 1975, was handicapped because of the restricted nature of its charge. It was limited to examining only the appellate courts and could not deal with district court jurisdiction or process; also, it was limited in its charge to reviewing and making recommendations concerning the boundaries of federal judicial circuits. Although the Commission did a superb job in collecting and evaluating data and in making recommendations, there is a feeling on the part of many who are familiar with the Commission's work that it was unduly restrained in its ability to deal with basic problems of the federal judicial system. Thus, any new commission should have its charge stated in the broadest possible terms.

One way to accomplish this is simply to authorize the commission to study and to make recommendations concerning the courts of the United States, including their jurisdiction, procedure, personnel, business, administration, and relationships to the courts of the states. Some general formulation of that type seems preferable to a spelling out in more detail of specific aspects of the system to be examined. If specifics are to be spelled out more fully, I am inclined to think that an amalgam of the provisions in S.675 and S.1530 would be adequate. These portions of the two bills together seem to provide all of the authority that could be desired in the commission.

It is important that the legislation make clear that the commission is charged with examining the appropriate allocation of authority between state and federal courts. The state-federal allocation problem has been growing in disarray for at least a quarter of a century. A perception of this development

prompted Chief Justice Earl Warren to suggest to the American Law Institute in 1959 that the Institute undertake a study of the subject. The Institute picked up on the suggestion and launched a major study, consuming several years, and culminating in the publication of the comprehensive report entitled Division of Jurisdiction Between State and Federal Courts (American Law Institute, 1969). Although many of the specific proposals in that study may no longer seem appropriate, it is a substantial and serious effort that would provide a good starting point for a new effort by a commission. It is clear that increasingly there are overlaps, duplications, and entanglements between the courts of the states and the courts of the nation that are costly, disfunctional, and productive of injustice. We are the only major federalism in the world that maintains a side-by-side dual system of federal and state courts, with concurrent or conflicting jurisdictions. The time is overdue for another thoroughgoing canvass of the subject and the preparation of legislation designed to provide for a more just and effective dual court system.[2]

The legislation should make clear, however, that the commission would not be confined to that subject. The other aspects of federal court jurisdiction need examination. The structure of the courts, their internal procedures, their personnel, and their administration all need a comprehensive fresh look in light of the greatly altered circumstances of the last two decades. The purpose of the whole effort would be to produce proposed legislation which Congress could then focus upon and after appropriate consideration enact either as proposed or as modified through the course of committee hearings and floor discussions.

In its studies and in the formulation of the legislative proposals the commission would necessarily be involved in planning ahead for the federal judiciary. The provision in S.1530 requiring the commission to develop "a long-range plan

for the future of the judiciary" is useful, however, in emphasizing that the commission should not be concerned solely with immediate, short-range problems.

Composition of Commission. To accomplish this important task, the commission should be large enough to reflect diverse points of view and concerns regarding the nation's judicial system. Given this need and the likelihood that not every member of the commission would be able to be present at every meeting, a membership numbering between fifteen and twenty seems desirable. This is large enough to include sufficient expertise, diverse points of view, and adequate members at any given meeting; yet it is not so large as to be unwieldy and to make fruitful collegial discussion impossible.

Both bills contemplate that members of the commission would be appointed by the President, the Chief Justice, the leadership of the Senate, and the leadership of the House of Representatives. I believe that concept to be sound as far as it goes.

In my view the membership could most appropriately consist of four members designated by the Senate leadership, four members designated by the House leadership (making a total of eight from the legislative branch), five appointed by the President, and five appointed by the Chief Justice. This would produce a commission of eighteen members.

Fewer than five members designated by the President and five members designated by the Chief Justice would allow insufficient room for the kinds of expertise and diverse viewpoints that are so necessary to the sound functioning of the Commission.

There should be a restriction concerning the political affiliation of the presidential appointees. The legislation should provide that no more than three of the five can be identified with any one political party. That is a preferable way to express the restriction. We live in an age of increasing numbers of political independents, and the legislation should

not imply that in order to be eligible for appointment to the commission a person must be an active member of a specific political party.

It would be inappropriate to place any restrictions on the appointments of the Chief Justice in terms of political party. As a member of the judiciary, the Chief Justice should be free to ignore political parties--as he should in his judicial work--in designating the best persons to sit on the commission.

In addition to the eighteen members suggested above, I endorse the idea embodied in S.1530 that the commission include two members drawn from the world of the state courts. The bills comtemplate that the commission will focus on questions of state-federal allocations of jurisdiction. Thus, much of the work of the commission will have a direct impact on the work of the state courts, and that perspective should be represented in its deliberations. This representation could be accomplished in one of two ways. The legislation could authorize the Conference of Chief Justices (consisting of the Chief Justices of the 50 states and a few other jurisdictions) to designate two persons to sit on the commission. In the alternative, the legislation could provide that the Conference of Chief Justices should designate one person and that the other person be the Executive Director of the National Center for State Courts or his designee. The National Center is a rich repository of information about all the state court systems; it is the one entity in the United States that spans all the state judiciaries and is responsible to all.

Suggested name of commission. Although the name of the entity to be created is not of major significance, there is value in having it short, simple, and accurately descriptive of its area of concern. These criteria seem to me to be well-satisfied by calling this body the "Commission on the Federal Judiciary."

## A Permanent Council

In addition to creating a temporary commission, S.1530 also would create a permanent council to examine continuously the federal judiciary and its problems and from time to time propose to Congress legislation dealing with them.

The seeds of this idea can be found as early as 10 years ago in the suggestion by Chief Justice Warren E. Burger that an inter-branch body be created to exchange information and discuss problems concerning the needs of the federal courts.

In 1976 Attorney General Edward Levi appointed a committee within the Department of Justice to survey the needs of the federal courts and to recommend measures. Among the recommendations of that committee in its report published in January, 1977, was the creation of an inter-branch body to be known as the Federal Judicial Council to do what the Chief Justice had suggested.[3]

The idea of such a permanent body was pursued later in 1977 by the Office for Improvements in the Administration of Justice which had been established in that year by Attorney General Griffin Bell. Attorneys from that office interviewed staff council in the Senate and House Judiciary Committees, representatives of the Chief Justice and others in the federal judiciary, and representatives from the Vice President's office. Although there was some endorsement in general of the idea, specific arrangements could not be worked out to the mutual agreement of all. Thus, nothing came at that time of the idea of establishing such a permanent inter-branch body.

Those efforts, combined with interest from other quarters, led to the launching by the Brookings Institution of an annual seminar at Williamsburg, commencing in 1978. The seminar has met each year since. Participants include members of the House and Senate Judiciary Committees, high-ranking officials from the Department of Justice, the Chief Justice and others from the federal judiciary, and other lawyers and law professors.

This annual gathering has proved to be a fruitful occasion for useful interchange concerning the problems of the courts, their needs, and ideas for legislative improvements. These seminars are informal and unofficial.[4]

A permanent council would be a useful addition that would not necessarily supplant or replace such an annual informal gathering. Rather, it would be a body with a solid, continuous existence that would examine problems, consider ideas, and make recommendations to Congress. The annual Williamsburg seminars would be a useful forum in which the council could test its preliminary ideas and obtain other ideas for possible study.

The kind of commission proposed above would have a limited life of two years. It would do a one-time job of canvassing the system and proposing legislation. But events in our time move so rapidly and circumstances change so frequently that a one-time effort would not likely put the system in position to go untended for another decade or two. Constant review and attention is necessary. If the commission did its job well, the permanent council would have an excellent starting point. As pointed out above, Congress is simply not in position to give the kind of continuous close scrutiny to the functioning of the federal judiciary that circumstances require, if the system is to be kept effective in the conditions of our time.

The provision in S.1530 requiring the commission to report to the permanent council and then for the council to report itself on the same matter seems unnecessary. Rather, it seems wiser to provide in the bill that the council would come into being three months after the terminal date of the commission's existence. There need be no requirement that the council study the commission's work and make another report at that point. The council will obviously begin with what the commission has done, and any further reporting would simply be a reporting on a report. Congress itself can give direct consideration to the

commission's report. The council should go forward from there, monitoring the system and dealing with new problems as they appear. Of course the council could at a later date review and revamp the commission's recommendations, if Congress had not yet taken action.

It seems appropriate that the council be a smaller body than the commission. A smaller body would be more efficient, less difficult to convene, and adequate to perform its assigned functions. A body of not more than twelve members seems desirable. Again, as in the composition of the commission, I suggest that at least one person from the state courts be a member of the council.

A simple but accurate title for this body would be "Federal Judicial Council" or "Advisory Council on the Federal Judiciary."

## Conclusion

When the federal judiciary was little more than a year old, members of the first Congress of the United States felt it desirable to call on outside assistance to examine the functioning of the federal courts and to recommend to Congress measures for their improvements. Thus, Attorney General Edmund Randolph was requested to prepare a report on the operations of the federal courts and to recommend such legislation as he thought desirable to cure defects in the system. Randolph responded to the request by submitting a comprehensive report and a proposed bill.[5] Thus the precedent was set early for the use by Congress of special outside assistance in discharging its responsibilities for keeping the judiciary in position to administer justice under law.

Today when the federal judicial system is an enterprise extending even beyond continental boundaries, and the Congress is far more burdened, the need for external assistance and advice is many times greater than it was in the dawn of the national government. The idea embodied in S.675 and S.1530 to create

a commission specially charged with canvassing the federal judiciary and recommending needed revisions is thus a sound, constructive step to assist Congress in its constitutional responsibility to maintain the third branch of government in position to deal with new, changing complexities of the late twentieth century. The creation of the kind of commission envisioned by these two bills should command wide support, and I hope that these measures will receive expeditious consideration.

The idea of a permanent body to examine continuously the function of the federal courts is also of increasing importance as the federal judiciary and its business grow larger and more complex and as the Congress is unlikely to find the time to monitor the system. If there is doubt about the wisdom of such a permanent body, however, the creation of a temporary commission should be dealt with separately and enacted promptly. The creation of such a commission is of greater, immediate importance, and its creation should not be delayed through uncertainties about the desirability of a longer-range, more permanent body.

FOOTNOTES

1. A more elaborate explanation of the need for a commission is contained in Meador, The Federal Judiciary--Inflation, Malfunction, and a Proposed Course of Action, 1981 B.Y.U.L. Rev. 617 (1981).

2. The trend toward a confusing merger of state and federal jurisdictions has been commented on by Chief Justice Burger in his welcoming address to the American Law Institute on June 10, 1980, and in Meador, Are We Heading for a Merger of Federal and State Courts?, 17 The Judges' Journal 9 (1978).

3. Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts (1977).

4. A history of these seminars is presented in Cannon & Cikins, Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation, 38 Wash. & Lee L. Rev. 1 (1981).

5. Am. St. Papers Misc., vol. I. no. 17 p. 21 (Dec. 31, 1790).

Senator HEFLIN. You have in your written statement some ideas that perhaps maybe some of the other witnesses might like to comment on as we go through. For example, on the relationship of the commission to the permanent council, you have a statement that says:

> The provision in S. 1530 requiring the commission to report to the permanent council, and then for the council to report itself on the same matter, seems unnecessary. Rather, it seems wise to provide in the bill that the council would come into being 3 months after the terminal date of the commission's existence. There needs to be no requirement that the council study the commission's work and make another report at that point. The council will obviously begin with what the commission has done, and any further reporting would simply be a reporting on a report. Congress itself can give direct consideration to the commission's report.

Now, that is one suggestion that maybe Judge Wallace would like to comment on when we reach that. I believe another suggestion that you made is that in the past, some of the study commissions have had restricted fields of inspection and review. You point out that the Hruska Commission was limited to examining only the appellate courts and could not deal with district court jurisdictions or procedure.

As I interpret your statement, you really, I believe, would favor a more comprehensive system in which you would authorize the commission to study and make recommendations concerning the courts, including their jurisdiction, procedures, personnel, business, administration, and relationships to the courts of the State, which would give it greater and more comprehensive jurisdiction.

Now, I do not want to misquote you on this, but have I articulated basically some thoughts that you have had about that, Dean Meador?

Professor MEADOR. Yes; that is a completely accurate statement of my thoughts.

Senator HEFLIN. Well, you might bear that in mind when we come around later on, either in your statement or later on, Judge Wallace, in regard to that.

We do have a situation where we have two commissions that came about for different purposes. There has been the suggestion that we could have one commission, and the overall commission could do the work that is suggested in the language in regard to studying the jurisdiction of the Federal and the State courts; that is 675, I believe.

So, maybe with that, we will hold other questions until later on and we can discuss them later on. I will now call on Judge Wallace. Judge Wallace, we are delighted you are here. I believe I have previously given the background as to how you became interested in this, and, if you will, maybe give us a little more of a background in regard to your interviews and your conclusions that you reached, along with your recommendations.

Judge WALLACE. Thank you, Senator Heflin. I want to express my gratitude for being invited to testify at this committee hearing. I deem this to be very important to the future of the judiciary.

My specific interest in this subject started in July 1980, when the Chief Justice of the United States requested me to give some consideration to what the judiciary would look like in the year 2000

and what some of the questions are that we should now be considering. I was not asked to provide any solutions.

As you indicated in your introductory remarks, I took about 6 months to talk with not only the legal community, but Senators and Congressmen, businessmen, labor leaders, and media representatives. The result of that survey, together with additional research, is contained in a document titled, "A Working Paper on the Future of the Judiciary," dated February 20, 1981, which I have supplied to the committee. I hope it will be included in the committee record.

Pursuant to the request I received from the committee, I prepared my written testimony, which I trust will also be included in the record.

Senator HEFLIN. It certainly will.

Judge WALLACE. Senator, based upon this study, I arrived at four conclusions: first, that our present system will be unable to meet the needs of our people in the year 2000 and still maintain all the societal benefits that the courts now provide; second, that consideration is necessary now for a proper and ordered solution to the problems which we will face; third, that an effective solution can best be achieved by addressing two goals—a shore-range goal which is to determine as best we can now, our future judicial needs and then to blueprint, a solution needed two decades from now, and a long-range goal which is to work toward meeting those needs; and, fourth, that to meet these two goals two separate organizations are needed—a legislative commission to determine what our judicial needs will be during the next two decades, and a three-branch oversight council to monitor our progress in addressing them and to recommend possible approaches from time to time.

Let me discuss those four conclusions briefly. To assess the needs of the judicial system in the future, consideration should be given to statistical projections. I am not sure how much weight should be given to them, but the projections as to what might occur in the district courts are significant. If the present trends continue, based upon our 1900 to 1980 statistics, there will be an increase in district courts in the year 2000 of 50 percent. If we use the base years 1975 to 1980, there will be a 100-percent increase.

Doubling the entire judiciary, with all of its staffs and supporting facilities, would be a difficult challenge. I do not believe that such an approach would be beneficial. Of course, these projections assume the current usage of the court, and I am not convinced that there will not be an increase in the use of the courts. I doubt that horizontal expansion will meet the needs of our country.

My working paper attempts to identify the questions that should be addressed. I strongly urge, and I am in agreement with Professor Meador, that we consider now how we should meet these future problems. Too often, we wait until the tidal wave is on us and then we react. Last-minute reactions do not always fit into an overall realistic design, and sometimes they are counterproductive. Thus my second conclusion is that we need to act now.

My third conclusion has to do with a two-phased solution. The first suggests indepth study in which we would bring together the best thinking on what we will confront in the year 2000. I believe that this study should utilize a multidisciplinary approach, and

would therefore be different from most studies done in the past. We need experts in many disciplines, not only legal scholars, to advise what our future problems will be, at least as best we can now perceive them. After ascertaining our future needs, this study group would formulate a plan to meet those needs. Thus, it would develop a blueprint of a proposed solution. This would provide the basis for a continuing evaluation.

My judgment is that too frequently, good work is done by commissions and other study groups but that their work is put on a shelf and nothing occurs. I believe it is important, for an effective, ordered solution, that a long-term oversight group be established which can continue to secure new data, continue to look at what is in the future, and make recommendations from time to time that will fit into the overall needs of the judiciary.

My fourth conclusion is that the implementation of this two-phased solution process requires two separate organizations; first, a legislative commission which would have a relatively short life and would make an in-depth study. It would function as the center of a web and would bring together all the past and present studies, both private and public. As Professor Meador pointed out, there is a substantial amount of research occurring and it is important to bring it all together. In doing so, the present knowledge can be meaningfully evaluated, and the Commission could generate the additional research necessary to meet the challenge that we have before us.

The permanent three-branch judiciary council, I think, is a significant addition. The proposal is that an equal number be appointed from the legislative, judicial and executive branches. This evaluation and reevaluation group, it seems to me, would be of tremendous importance in trying to bring an ordered solution to a tremendous problem.

This limited proposal would add nc new vast bureaucracy. It would be advisory only. It would make use of the private sector, which we need to do, and it would have a very limited cost.

Because of these four conclusions I favor the approach of S. 1530. S. 1530 does all that S. 675 envisions, plus it adds the vital aspect of planning for the future. S. 1530, by creating the permanent Federal Courts Advisory Council, assures the needed consideration of long-term needs. It provides a permanent body to give continuing attention to a difficult problem. It assures the President and Congress of recommendations for orderly and planned meeting of future needs, and it allows a variety of proposals to be considered in terms of what courts should be doing in the future as well as now.

S. 1530 provides the necessary two vehicles to meet the challenges of the year 2000. There are some specific language changes that I would recommend in S. 1530, and I have provided them in my written statement.

The question has arisen whether there is any duplication between the Commission and the Council. I do not believe there is. The Commission would focus upon bringing together all of the data and studies, and providing as best we can, in one instant of time, what our needs will be in the future and a proposed solution. It is, more like a snapshot.

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The oversight Council is more analogous to a motion picture. It will continue on; there will be additional snapshots that will be taken, and the Council will have an opportunity to move from the base of the work of the Commission into the future. With new data, it may modify the blueprint. This is the first reason why I believe that it is appropriate to separate the two functions.

As I envision this in-depth study, when it is developed it will not be in bite-size pieces which will automatically be a list of recommendations to the President and to the Congress. It will be a study large in scope and content, not only taking into consideration what we see now, but what we perceive will be our problems downstream.

The oversight Council would receive this vast work—the blueprint—and identify what our current first priority needs are, discuss the first recommendations, and establish additional priorities in the future. In other words, the Council would provide a practical and workable timetable of recommendations. Thus it would have separate considerations from those I envision the legislative Commission would have.

By not combining the two bodies, the separate functions will both be done properly. One vehicle will concentrate on the study and will secure all of the needed knowledge, while a separate vehicle will make application of the knowledge in a way that will be of assistance to the President and to the Congress. It will provide the facility to make timely recommendations.

If Congress is presented only with a Commission study, Congress is left on its own—and with all deference to Congress, a very busy Congress—to try to filter out what should be done now and what should be done later. By use of the oversight Council, we can solve that problem and have an orderly attack on the problems we have before us now and in the future.

I admit that thinking of the year 2000 can be mind-boggling, but I am convinced that with proper planning, we can meet the challenge. It may require changes and innovations, but we can make modifications and still maintain the important basic functions of our judicial system. I am convinced of it.

For those reasons, Senator, I support S. 1530.

[Prepared statement of Judge J. Clifford Wallace follows:]

TESTIMONY OF J. CLIFFORD WALLACE

Before the Senate Committee on the Judiciary

May 12, 1982

In a letter dated July 31, 1980, I was requested by the Chief Justice of the United States to consider the problems the judiciary may encounter in the year 2000. The assignment, as I understood it, was to bring some focus to the problems so that the Chief Justice would be in a better position to determine how to proceed towards possible solutions.

Fortunately, my charge was to identify questions, not to provide answers. Rather than rely on my own perceptions, I attempted to secure a wide variety of opinions. I spoke with lawyers, judges, educators, researchers, Senators, Congressmen, corporate executives, labor leaders, and others. In almost every instance, I sent an advance memorandum outlining the project and subsequently met with the person in his or her office for an in-depth discussion. Because of time and distance problems, a few of the conferences were by telephone. In all, I conferred with about 50 people. Many of the issues raised are contained in a partial report titled "Working Paper - Future of the Judiciary" which I request the Committee to file in these proceedings.

Based upon what I learned, I concluded that the way our system presently functions will not be adequate for the year 2000. Assuming the trend line will be constant to the year 2000, some rather interesting projections can be made. Based upon the 1900 to 1980 statistics, there would be an increase in district judgeships of 50 percent. Based upon the 1975 to 1980 statistics, which include our recent substantial increase, the judgeships by the year 2000 would increase 100 percent. If the latter projection were accurate, in the year 2000 we might need twice the number of trial courtrooms, distr[illegible]dges, clerks, marshals, secretaries, and, perhaps,

twice the number of circuits. There would be attendant large increases in the Administrative Office of the United States Courts and so forth. These projections assume the current rate of court usage. Actually, the use of the courts as problem-solvers may increase.

I spent an interesting evening with Professor Leo Levin and some of the Federal Judicial Center staff. They discussed with me the strengths and weaknesses in projections of this kind. I became convinced that with proper techniques, and appropriate caution, it is possible to make reasonable working projections of our future judicial needs. I am also convinced that it is doubtful that horizontal expansion is the proper way to meet those needs.

Let me now focus on the problems which we may expect in the year 2000. These will be largely the perceptions of others.

In analyzing the changes that will be required to meet the needs of the future, it is helpful to divide the problem into two parts: output and input. The input analysis focuses upon the types of controversies that are injected into the court system. The output analysis is concerned with how the courts handle their cases. Improving output is largely a matter of modification of the judicial machinery. The output analysis involves not only efficiency but also effectiveness, that is, quality.

This latter point is significant. It would be a great mistake if we considered our judicial system as machinery only, and graded it solely upon the number of case dispositions. I am aware of the case termination statistics kept by the Administrative Office of the United States Courts, but taken alone they paint an incomplete picture. In analyzing output we must not overlook the indispensable virtue of quality of justice.

Beginning with the output analysis, I will discuss

first the appellate level.

Some of the solutions interviewees suggested included a national court of appeals. This possibility is still receiving some attention. A surprising number of those I talked to proposed national specialty courts. As you know, for some years consideration has been given to the establishment of a national court for specialized areas such as patents. That has now been accomplished with the new Court of Appeals for the Federal Circuit. A number of people recommended that all tax cases should be in a national court. These proposals were usually an outgrowth of concerns about intercircuit conflicts. In discussing these concerns, it usually developed that two or three categories of cases were seen as causing the problem.

The question is then whether intercircuit conflict presents a substantial problem. If it is largely limited to certain identifiable areas, national courts in just those areas should meet the problem. The designing of solutions to this problem should, then, be preceded by a careful study of the nature of conflicts.

Is it necessary, for example, that all the law of the Ninth Circuit be identical with that of the Second Circuit? Are there regional differences that justify some conflicts? How many federal court litigants are involved in legal matters that cross circuit lines? To the extent they are involved in intercircuit litigation, are they usually able to accommodate reasonably? And to the extent they are not reasonably accommodated, does the subject matter of the particular cases lead to problems that require major surgical modification in the system, or do the problems require only such lesser changes as specialized courts?

From the broad perspective, we may wonder whether it is necessary to eradicate all conflict in case law. Some believe that any conflict is intolerable. However, our system is designed to have a certain amount of built-in flexibility.

For example, the Supreme Court does not attempt to solve all problems with one case. Frequently, the Court will provide a general principle -- leaving the circuits leeway in applying more specific rules to the cases they confront. This may result in conflicts among the circuits. I am convinced that this is not necessarily a vice. On difficult issues where reasonable minds may differ, the Supreme Court has the benefit of observing a "field experiment" in different ways a generality may be applied. In analyzing the different approaches, the Court is better equipped to refine the general principle. Indeed, if only one court or one person were capable of being absolutely right all of the time, we could do away with the court system -- at least if we could turn that person or court into a computer.

Thus, the benefits as well as the burdens of intercircuit conflict of decisions should, it seems to me, be analyzed to determine to what extent the existence of conflict requires major modification in our court system.

Those interviewed suggested several alternative ways of disposing of appeals. Some questioned whether appellate courts are needed in all instances. Why, they asked, is it not sufficient in some limited areas for appeals to be heard by a panel of three district judges from the district? Others questioned whether there may be some cases in which a district court judge's determination should be final -- that is, in which the nature of the problem does not require appellate review.

There was a considerable amount of discussion about creating different types of appellate treatment for different types of cases. Some suggested that there should be separate tracks within the appellate court for different types of cases. Due process does not necessarily require identical appellate treatment for each type of case.

One problem often identified was the possibility that

circuits would proliferate. As you might well envisage, if the number of circuits were doubled, we would encounter substantial challenges. Some anticipated, for example, that intercircuit conflicts would skyrocket, and result in institutional instability.

One alternative to circuit division is suggested by current experiments in the Ninth Circuit. Two critical problems face the large circuit: administration and the en banc court. By statute, courts of appeals with over 15 judges may establish administrative units. As a result, the Ninth Circuit has been separated into three administrative units, and many of the administrative chores are being delegated to those units.

The same statute allows a large circuit to have an en banc court with fewer than all the judges of the court. By a court rule, the Ninth Circuit now provides for a limited en banc panel of 11 judges selected by lot for each en banc case. Having sat on seven of these limited en banc cases, my impressions are positive. The critical question is whether each judge of the court of appeals will conclude that he or she need not vote on every en banc case. From my own observations, I sense a different climate when the selected judges represent the court. En bancs under the traditional system often centered around attempts by the author of the panel opinion to justify his or her position, in the face of repeated attacks by the panel dissenter. Now, only by chance is a member of the panel on the en banc court, and, so far, I have not witnessed any great defensiveness.

This experiment, if successful, will provide food for thought as to what might be possible in the future. It may be that dividing circuits is a trend in the wrong direction. Perhaps fewer rather than more circuits are needed. Suppose, for example, that we had four or five circuits across the United States. Although they would be larger, each could be

divided into administrative divisions for more efficient operation. Within each circuit the court could minimize intracircuit conflict through the limited en banc. If there were an intercircuit conflict that required resolution, a national limited en banc court could be constituted made up of judges from the four or five circuits. As any en banc court, it would have authority only for one case and would then dissolve. If this process were used to deal with those intercircuit conflicts requiring resolution, the Supreme Court could concentrate on the correction process rather than the elimination of conflict. This was an idea that germinated from the interviews.

Let me turn my attention now to concerns involving our trial courts and hearing officers. Many interviewees believed we should review our entire decision-making process below the appellate level, including the district courts, administrative law judges, bankruptcy judges, and magistrates. It is possible that there is a better way to make the entire system fit together.

For example, some suggested that we remove the administrative law judges from their agencies, make each an Article 1 judge with general jurisdiction rather than an agency specialist, and establish a separate administrative appellate structure. Others suggested there should be a review of the entire staff of the district court to see if there is a better way of handling the massive amount of work of the district judges.

Possible structural changes were suggested. For example, to accommodate big cases, it was suggested that judges become more fungible. Those district judges who are best able to preside over a particular type of case would constitute a pool of talent that could be used when such a case was filed, regardless where it was filed. One businessman took the concept one step further and suggested that all judges become

part of a computerized bank and that cases be assigned based upon a match-up of talents, etc.

It is clear that additional thought must be given to the administration of the increasing judicial workload at all levels. Many discussed the need for more effective use of administrators to assist judges. There was a fear of the increasing bureaucracy. In particular, there was a concern about the largest judicial bureaucracy, the Administrative Office of the United States Courts. Examination of lines of communication and responsibility is in order. Some question whether judges are still in control of the Administrative Office and whether it has been successful in removing the burden of administrative details from the judges.

Let me turn next to the input side of the analysis. Nearly all of the interviewees looked first to the legislature as the prime source of increased business. The problem identified by the legislators was that there is no single entity that evaluates the effect of legislation on the courts. The bills are considered by committees on the basis of subject matter. Many of those committee members and their staffs are not lawyers and do not have firsthand knowledge of the condition of the courts.

Other legislative problems that were raised included drafting ambiguities, inartful language resulting from congressional compromise, broad statutes that require litigation to provide definition, and the sheer number of legislative bills.

As to possible improvement, some suggested that there might be some way of developing priorities enforced by funneling all legislation which would add to court burdens through one committee. That was an idea that seemed impractical to the Senators and Congressmen I interviewed. Others reiterated the suggestion that judicial impact statements be filed with each bill. A legislative commission,

much like that which addressed the criminal law field, was suggested for civil law.

One of the ideas that surfaced frequently was that of alternative methods of dispute resolution. Many opined that it was time to consider whether some of the disputes that are now being handled within the courts might better be resolved in some manner other than the mainstream court system. Interestingly enough, there are now over 600 such programs in various parts of the United States. Congress passed an act providing for study of alternative methods of dispute resolution, but it has not been funded.

The basic question is which controversies can best be resolved in the mainstream court and which in another model. Cost/benefit analysis has been suggested by some to make that differentiation. Its application would establish priorities for the mainstream court. The decision would be based upon the cost of the system and the benefit to society. The lower priorities would be shunted over into some other model. This analysis, I suggest, is not the best approach to decide where people's disputes should be settled. A better analysis would be to identify which model can be most effective in resolving a particular type of dispute.

It became crystal-clear that there is a need to reinforce the use of the lawyer's office as a setting for the dispute resolution process. The lawyer's office is probably the place where most case resolution occurs. Drawing on this fact, many interviewees suggested that we should focus our attention upon the lawyer as a dispute resolver. The question arises as to what types of incentives are provided to lawyers to settle a case. When litigators talk among themselves, very few discuss their settlements -- usually the court victory is the topic of discussion. Some have suggested that students should not only be trained in law school to be good settlers, but that settlement should be highlighted as a more important

skill than the trial of a lawsuit. The idea was also advanced recommending disincentives, especially for strike suits.

The final area in the input analysis is the impact of case decisions. I do not intend to evaluate this area on the merits, but I point out that interpretation of the statutes and application of the Constitution can give birth to implied rights of action that result in more court business. The extent of pretrial proceedings, civil remedial orders, and the lack of clarity of appellate decisions, all have an effect on the amount of system input.

Considering the needs of the judicial system in the year 2000 can be mindboggling. This morning I have only skimmed the surface of what was a very stimulating six months' adventure. The future of the judiciary involves real problems that we all need to think about. I am convinced that, with planning, we can meet the challenges of the year 2000, but we must begin now to analyze our problems and to search for preliminary solutions.

Therefore, in the Working Paper I have recommended that there be an in-depth study, making reasonable projections as to the problems we will encounter. The study should bring together not only legal minds, but practitioners of social science, economics, and other disciplines. The result of that study would be recommendations of long-range goals for the judicial system. This would be a rough blueprint for the year 2000.

In the Working Paper, I concluded that a legislative commission would be the best vehicle to accomplish this task. I was amazed by the number of studies now in process in the non-government sector. The commission could become the center of a web, bringing together all of these ideas that are now being developed through foundations, the American Bar Association, private industry, and so forth.

Because the work of a commission has a tendency to die

at the end of its existence, I recommended a long-term oversight group that would receive the report of the study commission and make recommendations to the President and the Congress. As better projections of future needs become available, this permanent body would make needed revisions in goals and recommended implementation. It is this permanent body that would continue to assist in meeting our challenges of the year 2000. Thus, I suggest a permanent advisory judicial council; a small group made up of representatives of the three branches of government: executive, legislative and judicial.

Because of the conclusions I reached in the Working Paper, I favor the approach taken in S.1530. S.675 is more narrow in scope. It deals only with the issue of the jurisdiction of the federal and state courts. It does not put this issue into the broader context of how the judiciary will meet the needs of our citizens in the future. In addition, it provides only for a study commission -- leaving unfulfilled the need for a permanent oversight council to meet long-term challenges.

S.1530, on the other hand, can do all S.675 envisions and, in addition, provide the vehicle to attack constructively the problems which must be confronted in planning for the future. As I perceive the meeting of those needs to be of critical importance, I urge the Committee to consider favorably S.1530.

Let me now be specific about S.1530. I mentioned earlier that the legislative commission (designated in S.1530 as the Federal Courts Study Commission) and the permanent advisory judiciary council (designated in S.1530 as the Federal Courts Advisory Council) should have different and separate functions. As I see it, the commission, which would have a life of two years, would concentrate upon and be responsible for the study. The council, on the other hand, would be permanent and would have a long-range responsibility. It could

analyze and make periodic recommendations to assist in keeping the President and the Congress abreast of needed changes as we prepare for future judiciary needs. This permanent council would bring planning, consistency and continuity to problem solving rather than long overdo reactions and, too often, unfortunate results.

For this reason, I strongly favor the Federal Courts Study Commission reporting to the Federal Courts Advisory Council and the Council, in turn, making recommendations to the President and the Congress. S.1530 follows this procedure except for Sec. 2(b)(2) [p. 2, l. 21] and Sec. 5(a)(1) [p. 9, l. 6] in which the Council is bypassed as to one part of the study. I believe this is unfortunate and could lead to a loss of consistency of approach needed to help solve the overall problem. I strongly suggest that all phases of the commission's work be reported to the Council.

I also suggest Sec. 2(c)(3) [p. 3, l. 11] be modified to state: "review the findings and recommendations of the Federal Courts Study Commission;".

I would further insert between Sec. 2(c)(4) and (5) [p. 3, l. 15-1/2] the following "(5) make recommendations to the President and the Congress," and change section (5) to section (6) [p. 3, l. 16].

I am not particularly opposed to providing that two members of the Federal Courts Study Commission be named by the Conference of Chief Justices. Ideas from state courts will be helpful. In addition, the findings and recommendations of the commission will be of indirect assistance to the state courts where analogous problems in planning for the future also exist. I had in mind that this twofold aspect of state court involvement could best be implemented by a close liaison with the National Center for State Courts.

In Sec. 3(c) [p. 5, l. 16], the Bill properly calls for representation of varied interests, but then restricts that

variety of thought to only one of the many issues to be confronted. I would suggest striking the words "jurisdiction of the" from p. 5, l. 20.

I take no position on the required political party limitation for membership on the Council and Commission. I do not see the need for it because the nature of this project is not and should not be partisan. I must, however, defer on this issue to the Congress.

Finally, I would modify Sec. 5(b)(1) [p. 9, l. 21] to read, "review the findings and recommendations of the Federal Courts Study Commission."

Other than these suggestions, I find S.1530 well drafted and adequate for this much needed task. In my judgment, Senator Howell Heflin should be commended for his interest in and insight into this difficult problem. There is much to do -- this Bill will give us a start.

To meet our commitment to the system of justice, we may be required to change some procedures. It may mean substantial innovations. But I am convinced that we can meet our challenges in the future and still maintain the important, basic functions of our judicial system. To do so, however, will require more from us than ever before.

Senator HEFLIN. Of course, we have both, and it has been suggested that, really, the Commission, if it gave priority and a quicker study and a quicker reporting date on the jurisdiction of the Federal and State courts—it could be combined into one.

There is some feeling that the issue of jurisdiction has many, many contemporary, immediate problems that ought to be addressed, maybe in advance of some of the others. Do you see any objection if you were to give a higher priority and an earlier return date to the overall Commission pertaining to the Commission given in the Thurmond bill?

Judge WALLACE. If the Congress felt it was that critical, of course, I would not. My only question is whether it is really that critical. I am always concerned, when we are talking about something as delicate as the judicial fabric that interacts and weaves into such a large blanket, that we not take just a few threads and focus on them without considering them in the entire blanket's fabric.

If the Congress should conclude that it is critical to look at a particular problem initially, then certainly it is within this proposed mechanism to accomplish this because there would be the greatest opportunity to achieve Congress' purpose such that it would not in some way work at cross purposes with the future needs of the judiciary.

I understand that the Congress may wish to act with speed on some problem, but my concern is that it not be disjointed and that we be able to act in a way that moves us along the track toward the future needs. My preference would be to have all problems studied together and considered together. But I do not believe that it would be necessarily counterproductive, if the Congress wanted to set a time schedule and provide that one part of the study would report early, so long as it was borne in mind that every effort would be made to harmonize all proposals with the long-term needs.

Senator HEFLIN. In your structure of a council separate from the Commission, is there any advantage that could be gained if part of the Council were a part of the study Commission?

Judge WALLACE. I thought about that, Senator. The reason for the separation of the two groups is a difference of function. Therefore, in selecting the members of the Commission and the Council, I would assume that those who are delegated that responsibility will have in mind the function; that is, there might be an entirely different type of person you are looking for as a member of the study Commission than you are looking for for service on the long-term oversight Council.

To the extent that you find people who have the type of broad-gauge makeup that would enable them to do both, I personally see no problem with their serving on both. But I think that the main reason for the two groups is separateness of function and criteria for selection should be measured by the function to be served. That, to me, would be the primary criterion.

Senator HEFLIN. Another structural approach, in effect, would be that you would have a—and I throw this out for your comment; I am not advocating it, but just exploring it—would be that you would have sort of an Executive Committee which would form the Council from the Commission, and the Commission would be ongoing and the Executive Committee would do the work of the Council.

What problems, disadvantages and advantages do you see under such a structural arrangement?

Judge WALLACE. Well, the Commission, as I understand it, is short-term—2 or 3 years.

Senator HEFLIN. Well, suppose you would make it a long-term basis and have your Council, in effect, as an Executive Committee? That is just a different structural approach.

Judge WALLACE. I do not have any strong feelings as to structure, as long as the purposes are met. I prefer a separateness of the two because I envision their being entirely different, but I would not necessarily disagree with this suggestion. I see some difficulties in the combination of the two that are not present in the program as enunciated in S. 1530.

Senator HEFLIN. Your basic idea is that we have had, really, the need for a study commission. We have had commissions that have studied in the past, but really no comprehensive one has taken place. Then you say that studies end up with reports on shelves and no action being taken on them. In order to see that action is taken, you want a permanent body which represents the three elements of Government to have a continuing responsibility to, in effect, prod and to constantly review other matters that come along. It is a prodding and also an ongoing study in itself.

Judge WALLACE. Precisely, Senator.

Senator HEFLIN. Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman. I apologize for coming late. I guess I will address this question to Judge Wallace or Professor Meador, either one, but to Professor Abernathy as well.

The essential question is why cannot the Judicial Conference or, you know, the House and the Senate Judiciary Committees delve into these matters? I understand that there is a need to root out some of the differences between Federal and State court jurisdiction, particularly with the overload of the Federal courts. There are certainly some broader questions, too, that are addressed in 1530.

But, fundamentally, why cannot existing organizations handle the problem?

Judge WALLACE. I think that is a valid concern, Senator. In my working paper, I identified the possibility of using subcommittees of the Congress as well as committees of the Judicial Conference of the United States to develop this type of study and, in addition to that, what oversight opportunities there would be within those structures.

I start with the premise that I do not believe in creating unneeded new bureaucracies. If the needed task can be accomplished within exsiting structures that is what ought to be done. But my perception of the problem is that it must be attacked with two prongs. The first prong constitutes the initial study: to bring together all of the work that has been done into one evaluating group. A lot more research and study is occurring in the private sector, I found out, than I ever imagined. Many groups are studying this problem with private money. To bring all of this knowledge together, I think, is important.

I am sure it is possible to accomplish a valid study on future judicial needs with a congressional subcommittee. But the Congress is very busy. Perhaps a subcommittee could bring all these studies together and provide the added research with proper staffing. It is also possible that a committee of the Judicial Conference of the United States could do the same.

But the second prong is equally important to the resolution of our long-term problems; that is accomplished in S. 1530 by an oversight commission—some organization that will constantly look at the problems of the judiciary as we move toward our future challenges and will provide timely recommendations so that events do not result in overreaction or underreaction or reaction in a way that is counterproductive to our long-term needs.

Now, with all due respect to the Congress, I think it would be very difficult for the Congress to provide that type of function on a continuing basis, because there are so many other critical issues that constantly require congressional attention.

I came to the same conclusion as far as the Judicial Conference of the United States is concerned. But, more importantly, I envision this long-term relationship as one that would be a cooperative venture among the three branches of Government. I think the time has come when we need to look to a partnership in which the executive, the legislative, and the judicial branch would work together. There is no organization that can do that now without establishing something similar to S. 1530. So, for those reasons, I suggest a new program.

Senator BAUCUS. I understand that, but, gosh, there have been so many commissions and so many studies around. Generally, they are put on a shelf somewhere, and that is in part because these commissions do not have a lot of authority. I mean, they can make recommendations, and if the recommendations are valid, theoretically somebody will pick them up and the Congress will act on them.

But it seems to me either a commission has authority—and if it does, it rivals the power of some other organization—that is, Congress or the executive branch, or maybe even the judiciary for that matter—or it has no authority and it just is another study. So, why is this going to be any different?

Judge WALLACE. I think you are 100-percent right. If only a commission were established it would probably end on a shelf and that is all that would occur. The genius of S. 1530 is that it provides the three-branch long-term oversight council, which will allow a continuing study and require annual reports. Thus, the Congress would be favored annually with a review of what the current problems are in the judiciary and how they fit into our long-term needs.

In that way, the Congress would have the opportunity of having fresh information on the current problems provided through this instrument. I agree with you Senator, that if only a commission is established, the tendency is that very good work ends up on a shelf catching dust. I believe that combining the two prongs is essential to do the job that needs to be done.

Senator BAUCUS. Now, could you help me? What is in this oversight function that is different from an ordinary commission?

Judge WALLACE. Yes. The legislative commission set up in S. 1530, as I understand it, will accomplish the research that will bring together everything that has been done into one study group which will then outline not only what current judicial needs are, but, as best they can be perceived, the judicial needs in the year 2000. The commission would outline what is necessary to meet those needs—a blueprint for the future.

Then the oversight council—a permanent oversight council—would take this blueprint, modifying it as new data becomes available, and annually making recommendations, based upon the initial study and all new information, to the President and to the Congress as to what the current needs of the judiciary are.

In this way, we do not wait until the huge tidal wave of critical problems comes along and then begin to react. In an ordered, sys-

tematic way, we can look toward the future and begin to build toward the future needs of the judiciary. For example, Congress would receive more than sterile data on the need for more judges, because the Council could recommend priorities as to the best use of the Federal courts, suggest what their nature should be, and raise the manifold considerations that should be presented for the benefit of the Congress. Thus Congress could make appropriate decisions based on long-term considerations and needs.

Senator BAUCUS. Professor Abernathy, do you have any reaction to my questions?

Professor ABERNATHY. Yes. I was glad to hear Judge Wallace say that what he really expects this commission to do is assemble the existing evidence. I think in that regard this Commission, and even the Council, will simply be replicating the work of existing bodies. We have a lot of bodies gathering this evidence now—at least 27 different Federal judicially oriented bodies doing it.

I think the thing that the Commission and the Council may be able to do is add a political overview to all of this 'if you look at the appointment process and see who is going to be put on the commission. But I think in that regard there are some defects that I will talk about in my remarks later on.

But I think the main thing in that regard is that the primary thing you want the Council and the Commission to do is to have some political oversight and get politically involved with these studies. Then what we need to do is, instead of creating a $1 million a year bureaucracy, we need to authorize a good case of California wine to be bought and everyone meet at Senator Thurmond's house one Saturday night to discuss these problems. If we could do that every 2 or 3 years, I think we could get just as much done as if we have this permanent bureaucracy.

Senator BAUCUS. Are any of you concerned with the number of 12; that is, a commission that large in size? Frankly, it just strikes me as perhaps a bit large, or is that significant to anybody?

Professor MEADOR. It is the Council that is supposed to be 12. I have proposed a commission even larger than the one proposed in both these bills. I think a commission of about 18 or 20 is what is needed. It would be difficult to get into the commission all of the different types of people you need with different perspectives and different expertises, and so on, with much less than that, it seems to me. That is not too large to be a group that can work collegially. Experience suggests that not every single member attends every meeting anyway.

Senator BAUCUS. We have had some commissions that I think have been helpful. The National Commission on Air Quality helped, and then there is the Immigration Commission, and some other commissions. I mean, there are examples, I think, where these kinds of organizations have been helpful.

Professor MEADOR. Let me add a word in answer to your original question about why existing bodies cannot do it. I think the answer to that, at least in my mind, comes down to two things. One is time, and the other is perspective.

In theory, congressional committees could do this, but my feeling is that there just is not time; it is not there, and they are unlikely ever to find it. As I point out in my written statement, even the

first Congress, which had almost nothing to do compared to Congress now, sought outside help and got the Attorney General to study the system and submit a report on the Federal courts, with recommendations as to what to do. So, you have the time problem.

I think the same time problem exists in the Judicial Conference. Those are very busy judges. The inescapable administrative duties they have to perform to run the system keep them tied up.

The other reason is perspective. If you leave it to the Judicial Conference, all you are getting is the perspective of the judges, which is fine; we need that, but we need other perspectives also. I think the same is true inside the congressional committees.

The beauty of the commission, to me, is it is a mechanism that enables a range of perspectives—the executive branch, the legislative branch, the judicial branch, and the public in other disciplines—to be brought to bear at the same time on the problem.

Senator BAUCUS. If either of these organizations are not authorized, what dire consequences are going to befall our country? What is going to happen?

Professor MEADOR. I am sorry; I do not quite understand your question.

Senator BAUCUS. Well, I mean if neither of these bills is enacted, so there is no commission and there is no council, what adverse consequences are going to occur?

Professor MEADOR. Well, in my own view, I think the judiciary will rock along with worsening problems: it would take quite a while, I think, to tick off at least what I would perceive to be problems out there now that will worsen. I could go into that at some length.

Senator BAUCUS. What are one or two that come to mind?

Senator HEFLIN. Well, I think one thing that is coming along is you are going to have a patch-on situation. Today, we have got a patch-on situation on magistrates. In 11 years, you have nearly as many magistrates as you have judges, or you will have closely. You patch on a duty here and you patch on there without any real thought or any real planning on structure.

It is the difference between a craftsman patching or an approach from an architectural basis, as I see the thing.

Let me ask you this, Professor Meador. Of the commissions that have studied in the past, has there been one that gave a comprehensive look to the judicial system of both the State and the Federal Government, as this would do?

Professor MEADOR. Not to my knowledge. The American Law Institute study in the 1960's did give a pretty comprehensive overview of the system. It was not totally comprehensive, but it is the closest thing we have had, I believe, in the history of our judiciary to an overview of both State and Federal systems, with an effort to sort out their respective authorities and to develop a rational set of jurisdictional proposals. The American Law Institute is not a governmental commission.

Senator BAUCUS. Mr. Chairman, I wonder if I could ask one brief question. Does any member of the panel favor both bills?

Professor MEADOR. Yes, I would favor both by putting them together. [Laughter.]

Senator BAUCUS. So, you would fold S. 675 into 1530, then?

Professor MEADOR. I see no inconsistency between them.

Senator BAUCUS. Do other members have the same view or a different view?

Judge VANCE. My views are that the breadth of the commission's role in S. 1530 is preferable, but I have reservations about the council; I would stop there.

Mr. WILLIAMS. Mr. Chairman, I would like to respond.

Senator HEFLIN. We have got a vote on now and we are going to have to go back there. Go ahead, Mr. Williams.

Mr. WILLIAMS. Well, I can be very brief.

Senator HEFLIN. All right.

Mr. WILLIAMS. I would just like to call attention, if I may, to the response to the Senator's question about the reasons for 1530 affording some hope of success. I think it builds on the experience in the States. Where successful reform or improvement has taken place in States, of which the Senator's own experience is one good example—it has been built on the notion that there has been, first, a comprehensive study; that there has been, second, a continuity, which is provided for, as I understand it, in 1530; and that there has been lay participation.

One of the key factors, possible under terms of the legislation, is the participation of citizens in the furtherance and strengthening of their justice system. That was key and has been key to the State reform picture, and I would hope would be true in the proposed legislation here.

Senator BAUCUS. Thank you very much.

Senator HEFLIN. We have got to go vote. We will be back shortly, if possible.

[Whereupon, a brief recess was taken from 11:12 a.m. until 11:31 a.m.]

Senator HEFLIN. All right, we can get started again.

Judge Vance, we will be delighted to hear from you. Judge Wallace, did that complete your statement? We did not interrupt your statement? Do you want to add anything else before we go on to another witness?

Judge WALLACE. No; thank you very much, Senator. I have concluded.

Senator HEFLIN. All right. Judge Vance, we would be delighted to hear from you now.

Judge VANCE. Senator, it is a pleasure to be here, and I think I should observe that our Nation is very fortunate to have a person of your outstanding, demonstrated competence in the field of judicial reform taking a position of lead in this vital area.

The thrust of my remarks, as prepared and submitted, deals primarily with the underlying needs—conditions which make this type of study important today. I made a few general comments and a few specific comments, and I will summarize them.

I think we all recognize that we have become an incredibly litigious society. We have become a nation with an inordinately high crime rate. Our legislatures, both at the national and at the local level, have developed habit patterns where they create more and more private rights of action. The result is that the workload of the courts in the Nation is increasing at a rate that is almost out of control.

The causes of this disturbing development have not been identified with any real degree of certainty. In some Western nations, bringing a lawsuit is not regarded as proper business or social behavior. In the United States it is almost a national pasttime.

The truth is that because we lack a meaningful understanding of the dramatic increase in the propensity of our people to litigate, we probably cannot place a great deal of confidence in any of the projections of our future needs. We can be reasonably assured, however, that the demands on the judicial apparatus will continue to increase dramatically.

I do not think overall averages sufficiently identify areas of stress. We must look at the extreme situation. I serve on a court in an area where the extreme exists. From the time that I began the practice of law until the fifth circuit came to an end on October 1 of last year, the workload on that one court increased 1,000 percent. Moreover, the rate of increase seemed to be growing rather than diminishing. A 1,000 percent increase over the next 25-year period would mean that a court of appeals would be needed in each of the present districts within that circuit.

The traditional approach of the bench and the bar and many of the legislative bodies has been simply to improve the judicial process itself. The type of problem that looms before us today, however, requires more than just tinkering with or overhauling the mechanism. The addition of a few judges or the juggling of jurisdictional lines or the simplification of procedures or paperwork is no solution when you contemplate caseload increases in the 1,000 percent range.

It seems to me that inquiry at various levels is indicated, and that the same problems that confront the Federal judiciary confront the judiciary at State and local levels as well. It will be difficult to confine an inquiry to the Federal courts alone. The search for root causes will necessarily touch almost every aspect of life in our country.

I do not mean to imply that the primary thrust of the proposed legislation is any less important; quite the contrary. That the overall problem is so pressing makes it all the more imperative, it seems to me, that the Federal judicial mechanism be as faultless as possible.

One new area of inquiry that I will mention just briefly is the search for quick, inexpensive, workable and just alternatives to litigation. For present purposes, it is sufficient that we note that alternative methods of dispute resolution is a subject to which increasing inquiry is both necessary and appropriate.

In connection with the proposed reexamination of the jurisdictional lines between the courts of the United States and of the several States, I would like to comment on two specific areas which I consider to be the most important. The first concerns diversity jurisdiction.

By way of generalization, I think it is a correct statement that the bar, at least in my circuit, overwhelmingly favors retention of diversity jurisdiction. Problems inherent in the administration of State law by a Federal tribunal, however, make it desirable that such jurisdiction be held to the minimum necessary to provide its

intended protection to out of State litigants. Happily, this is a problem that may be diminishing in comparative importance.

In 1960, in the old fifth circuit, for example, diversity cases made up 27 percent of the caseload. During the first 6 months of the existence of the new eleventh circuit, the figure was only 11 percent of the caseload. This does not mean that diversifications are decreasing in number, but they are not increasing as rapidly as other types of cases.

Much study has been done by the American Law Institute, which has made very sound recommendations. Any commission you create, and ultimately the Congress, can gain very helpful insight from that study. This is particularly true of the recommendation that diversity jurisdiction be amended in two respects; first, that no plaintiff be allowed to invoke Federal jurisdiction in a State in which he is a citizen solely because the defendant is a citizen of another State; second, that after it has maintained a local establishment in a State for 2 years, a corporation partnership or proprietorship should be considered as a citizen of that State for Federal jurisdiction purposes.

To these recommendations, I would add a third, that the minimum amount in controversy probably should be increased from $10,000 to some higher figure. With the possible exception of this third recommendation, these other recommendations do no violence whatever to the original concepts of fairness which brought about diversity jurisdiction.

The figures provided to the American Law Institute by the administrative office are several years old, but they indicate that these few changes would probably reduce diversity jurisdiction cases by about 50 percent.

An area which I consider to be more pressing involves Federal jurisdiction in habeas corpus proceedings. Unlike diversity cases, the trend line here is clearly upward. Two decades ago, habeas cases comprised only 2 percent of the cases in the old fifth circuit. They now constitute 10 percent of the caseload in our new eleventh circuit.

In addition to a workload problem, these cases produce difficult conflicts within our dual system of Government. They also occasion the greatest outbursts of emotion and dissatisfaction among the populace in general. They are by no means limited to capital cases, but the cases in which the death penalty has been imposed are the ones that make the headlines and cause the most violent reactions.

My section of the country has an inordinately high population on death row. Within the 3 States now comprising the eleventh circuit, there are over 300 condemned prisoners. In Florida, alone, there are 179 awaiting execution.

The path to finality in a capital case totally confounds the average citizen and defies rational explanation by lawyers and judges. It is typically a 10-step process that extends over 3, 5 or 7 years. From trial, the judgment is appealed to an intermediate State court, then to the highest State court, and finally a petition is addressed to the U.S. Supreme Court.

At this point, the merits review is complete and a death warrant may issue. Finality, however, is nowhere in sight. A collateral attack begins at the State trial level, then the intermediate level,

and finally the State supreme court level, and that is the seventh step in the process. A death warrant may again issue, but is likely to be stayed because the accused can then present his Federal constitutional question to a U.S. district court on petition for habeas corpus, then to the court of appeals, and finally back to the U.S. Supreme Court.

No other country that I know of has such an evolved, extended system of review. It can hardly be justified by logic or reason or concerns for the protection of constitutional rights. This is not to criticize habeas corpus, as such. It serves a great and noble purpose. Nor am I critical of the attorneys whose job it is to present forcefully every argument that offers any reasonable prospect for saving their clients.

What I am saying is that the system is obviously flawed. It has evolved without any direction or sense as the byproduct of our dual system of justice. It has reached the point where it requires correction.

There have been several suggestions in connection with habeas. One is that perhaps habeas jurisdiction of the Federal district courts and courts of appeals should be abolished entirely. Another—and one State has adopted this—is a unified State appeal system so that the merits appeal and the collateral attack are combined, thereby eliminating three steps in the process. Georgia has recently adopted this approach and should have some meaningful information available for the rest of the country before too long.

Some suggest abolishing the exhaustion of State remedies requirement. This would also eliminate three steps in the process as it now exists.

A fourth suggestion is that a strict statute of limitations be adopted. Congress has considered this proposal but has been unwilling to adopt it.

A fifth is that the jurisdiction of Federal inferior courts should be restricted in this type of proceeding. In his dissent in *Rose* v. *Lundy,* Justice Stevens identified four types of constitutional error. Recognition of these different levels of constitutional attack raises a question as to where Federal court intervention should begin. Some would suggest that only at the fourth and most serious level of constitutional defect—those involving fundamental unfairness or injustice—can we justify Federal intrusion into State criminal justice procedures.

So long as the present law exists, however, Federal judges will apply it, even though they recognize that its application in many instances has undesirable results. I know of no Federal judge who derives any pleasure from sitting as a super State supreme court and overruling the highest court of his State. We invariably are urged to do so in habeas corpus proceedings, all too frequently for trivial claims of error on which a constitutional label has been pinned.

The legislative approach is not necessarily the most appropriate one to correct this condition, but this problem does appear to be one justifying detailed examination and study.

I think my short answer to Senator Baucus' question is that the problems that exist are very real problems; they are pressing problems. They may soon be overwhelming problems, and the present

investigatory bodies have not come forth with solutions that were capable of being adopted.

I think the commission approach provided by both of these measures is a very worthwhile one that offers some prospect of comprehensive study that could result in the passage of vitally important legislation.

[Prepared statement of Judge Robert S. Vance follows:]

STATEMENT OF ROBERT S. VANCE, UNITED STATES CIRCUIT JUDGE
BEFORE THE SUBCOMMITTEE OF COURTS, COMMITTEE ON THE JUDICIARY

Mr. Chairman and Members of the Committee:

S.675 and S.1530 reflect commendable concern for two somewhat distinct but overlapping areas: (1) the continued effectiveness of the federal judiciary over the next several decades; and (2) the tension resulting from the drawing of federal-state jurisdictional lines. My comments addressed to the first area are somewhat general. In connection with the second they are more specific.

Within the six states that comprised the old fifth circuit, the conditions giving rise to these concerns appear in their most extreme form. Congressional sensitivity to that fact resulted in your prompt and affirmative response to that court's petition that it be divided into two circuits. My comments are from the vantage point of a judge of the old fifth and now of the eleventh circuits. To the extent that they reflect conditions on those courts they do not purport to be typical of nationwide conditions.

In examining the litigation explosion that is applying unprecedented pressure to the judicial system the use of averages probably does not accurately convey its full implications. The conservative figures of the Administrative Office of the U.S. Courts projects a fairly manageable trial court workload over the next two decades and a somewhat more troublesome workload on the appellate level. Judge J. Clifford Wallace's more realistic projection indicates a needed increase in judicial manpower of over 100% over the next two decades. On the other extreme one study by a professor at Stanford based on an extrapolation of the last five years' figures theorizes that by the year 2010 we will have 1,000,000 cases pending in the federal appellate system and over 10,000,000 pending at the federal trial level.

From the time I began the practice of law until the

time the fifth circuit was divided on October 1st of last year, its workload had increased approximately 1,000%. At that time we were deciding approximately 5,000 cases a year and filling substantially over 10,000 pages a year in Federal Second. Similar growth over the next 25 years would necessitate our having a court of appeals in each of the present districts making up the old fifth circuit. The fifth circuit's caseload growth was higher than average. It is also true, however, that the rate of that growth seemed to be increasing rather than declining.

We have become an incredibly litigious society. We have become a nation with an inordinately high crime rate. Our national and state legislatures habititually create more and more private rights of action. The workload of the courts of the nation is increasing at a rate that is almost out of control.

The causes of this disturbing development have not been identified with any real degree of certainty. In some western nations bringing a law suit is not regarded as proper business or social behavior. Here it seems almost a national pastime. Are we merely becoming the most quarrelsome people on earth? Have we so much pent-up injustice that increased access necessarily brings forth a flood of litigation? Why does our society resort to litigation when somewhat comparable societies regard it as unacceptable?

The truth is that because we lack a meaningful understanding of the dramatic increase in the propensities of our people to litigate, we probably cannot place a great deal of confidence in any of the ominous projections. We can be reasonably assured, however, that the demands on the judicial apparatus will continue to increase dramatically.

The traditional approach of the bench and bar and the many legislative bodies of the land has been to improve the judicial process itself. Great work has been and is being

done. In some instances the results have been quite dramatic. The problem looming before us, however, calls for more than just tinkering with or overhauling the mechanism. The addition of a few judges or a juggling of jurisdictional lines or the simplification of procedures or paperwork provide no solution for caseload increases in the 1000% range. Inquiry at various levels is indicated. The same problems that confront the federal judiciary confront the judiciary at state and local levels as well. Many of the causative agents seem to have an impact across the board. It will be difficult to confine an inquiry to federal courts alone. The search for root causes will necessarily touch almost every aspect of life in our nation.

I do not mean to imply that the primary thrust of the proposed legislation is any less important. Quite the contrary. That the overall problem is so pressing makes it all the more imperative, it seems to me, that the federal judicial mechanism be as faultless as possible.

One new area of inquiry is the search for quick, inexpensive, workable and just alternatives to litigation. A great deal has been done in this field. For present purposes it is sufficient that we note that alternative methods of dispute resolution is a subject into which increasing inquiry is both necessary and appropriate.

In connection with the proposed reexamination of the jurisdictional lines between the courts of the United States and of the several states, my comments are addressed to the two specific areas that appear most important.

The first concerns diversity jurisdiction. By way of generalization, I think it clear that the bar in my circuit overwhelmingly favors retention of some type of diversity jurisdiction. The reasons are primarily the same as those that gave birth to such jurisdiction. Problems inherent in

the administration of state law by a federal tribunal, however, make it desirable that such jurisdiction be held to the minimum necessary to provide its intended protection to out of state litigants. I disagree with those who argue that because federal courts are inherently of higher quality than state courts, diversity jurisdiction should be exploited to the maximum to achieve the highest possible quality of justice. Our concept of federalism simply does not allow such a conclusion.

At least from my vantage point the problem of diversity jurisdiction is diminishing in overall importance. The figures from the old fifth circuit court indicate that in 1960 diversity cases made up 27% of its total workload. For the first six months of the operation of the new eleventh circuit, diversity cases make up only 11% of our total caseload. This is not to say that the number of diversity cases is decreasing. It is simply not increasing as rapidly as the number of other types of cases.

Much time and study has been put into the American Law Institute's recommendations in this area and any commission that you create, and ultimately the Congress, can gain very helpful insight from that study. This is particularly true of the recommendation that diversity jurisdiction be amended in two important respects: First, that no plaintiff be allowed to invoke federal jurisdiction in a state of which he is a citizen solely because the defendant is a citizen of a different state. Second, that after it has maintained a local establishment in a state for two years, a corporation, partnership or proprietorship should be considered as a citizen of that state for federal jurisdiction purposes notwithstanding that its place of incorporation and principal place of business may be elsewhere. To these recommendations a third probably should be added: The amount in controversy requirement probably should be increased from $10,000 to

some higher figure. With the possible exception of the third, these recommendations do no violence whatever to the original concepts of fairness which brought about diversity jurisdiction. At the same time they would probably reduce the diversity caseload in federal courts by approximately 50%.

I should not leave this subject without one further observation. In restricting diversity jurisdiction the workload problems of our system of justice are in no respect diminished. The cases are simply transferred from the federal to state courts. They still must be handled by those courts. In a sense, therefore, the problem of society is in no way alleviated by such measures. The responsibility of the Congress and of the federal judiciary, however, directly involves the efficient administration of justice by the courts of the United States. The recommended diversity changes will materially assist in meeting that responsibility.

The area on which I would like to make more specific comment concerns jurisdiction in federal habeas corpus proceedings involving state prisoners. Unlike diversity jurisdiction, the trend line here is clearly upward. Two decades ago state habeas cases comprised only 2% of the cases of the old fifth circuit. They now constitute 10% of the caseload of our new eleventh circuit. In addition to a workload problem these cases also produce difficult conflicts within our dual system of justice. They also occasion the greatest outbursts of emotion and dissatisfaction among the populace in general. Habeas cases are by no means limited to capital cases, but the cases in which the death penalty has been imposed are the ones that make the headlines and cause the most violent reaction. My section of the country has an inordinately high population on death row. These are now over 300 death row inmates in the states of Alabama, Florida and Georgia. In Florida alone there are 179.

The path to finality in a capital case totally confounds the average citizen and defies rational explanation by lawyers and judges. It is typically a ten step process that extends over three, five, seven or more years: From trial (step one) the judgment is appealed to an intermediate state court (step two), then to the highest state court (step three) and finally a petition is filed with the U.S. Supreme Court (step four). At this point the merits review is complete and a death warrant may be issued. Finality, however, is nowhere in sight. A collateral attack begins at the state trial level (step five), then proceeds through the state court of appeals (step six) and the state supreme court (step seven). A death warrant may again be issued but is likely to be stayed because the accused can then present his federal constitutional qustions to a U.S. district court on petition for habeas corpus (step eight), then to the court of appeals (step nine), and finally back to the Supreme Court (step ten).

The facts of life are that condemned prisoners will appeal to the federal courts alleging that their constitutional rights have been violated. At that stage the prisoner is usually represented by capable counsel who will invariably be able at least to allege a substantial federal constitutional question. As the law now stands it is the duty of the federal tribunals to stay the execution until the constitutional claim is considered.

No other country has had such an involved, extended system of review. It can hardly be justified by logic or reason or concerns for the protection of constitutional rights. This is not to criticize habeas corpus as such. It serves a great and noble purpose. Nor am I critical of the attorneys whose job it is to present forcefully every argument that offers any reasonable prospect for saving their clients. What I am saying is that the system is obviously

flawed. It has evolved without any direction or sense as the byproduct of our dual system of justice. It has reached the point where it requires correction.

There have been many suggestions.

--Some urge that the habeas corpus jurisdiction of the federal district courts and courts of appeals should be abolished entirely.

--Others have proposed and at least one state has adopted a unified appeal system that is designed to combine direct appeals and collateral attacks and thereby reduce the number of steps in the state courts.

--Some suggest abolishing the exhaustion of state remedies requirement. This would also reduce the process by three steps in most instances and probably would reduce the process by at least a year.

--A fourth suggestion is that a strict statute of limitations be adopted for collateral attacks by habeas corpus proceedings. Congress has considered this approach but has been unwilling to embrace it. As a result we have substantial numbers of collateral attacks coming many years after conviction.

--A fifth approach suggests restricting the jurisdiction of inferior federal courts in § 2254 habeas proceedings. In his dissent in Rose v. Lundy, Justice Stevens pointed out that there are various types of constitutional error. The one most frequently encountered attaches a constitutional label to a set of facts that do not disclose any actual violation of a constitutional right. The second class involves constitutional violations that are not of sufficient import in a given case even to justify a reversal on direct appeal, much less a remedial action on collateral attack. His third category includes errors important enough to require reversal but not so fundamentally unfair to the accused as

to support a collateral attack on a final judgment. The fourth cateogry involves errors so fundamental that they infect the validity of the underlying judgment itself or the integrity of the process by which that judgment was obtained. Recognition of these different levels of constitutional attack raises the question as to where federal court intervention should begin. Some would suggest that only at the fourth and most serious level of constitutional defect, those involving fundamental unfairness or injustice, can we justify federal intrustion into state criminal justice procedures.

So long as the present law exists, federal judges will apply it, even though they recognize that its application in some instances has many undesirable results. I know of no federal judge who derives any pleasure from sitting as a super state supreme court and overruling the highest state tribunal. We invariably are urged to do so in habeas corpus proceedings, all too frequently for trivial claims of error on which a constitutional label has been pinned. The legislative approach is not necessarily the most appropriate one to correct this condition. But this problem does appear to be one justifying detailed examination and study.

These two specific areas are far from an exhaustive list of subjects that profitably may be considered. They are specifically cited because they constitute two of the most troublesome problems that underline the need for meaningful study of the range and scope of federal jurisdiction in our changing society. For the most part I have not intended in my remarks to provide solutions but simply to emphasize that the importance of the subject area merits the most thorough examination possible. The proposed Federal Jurisdictional Review and Revision Commission or the Federal Courts Study Commission could conduct such an examination and study.

Senator HEFLIN. You indicated that you had some reservation about the council earlier. Do you want to address that?

Judge VANCE. Senator, I have a natural bias against additional organizations within the judiciary. I have been appalled at the amount of time I spend with administrative details—probably 25 percent of my time, shuffling papers and answering inquiries and dealing with things that have nothing to do with judging cases.

I am skeptical about any new, permanent organizations—layers of bureaucracy within the Federal judiciary. My personal preference is to create only commissions which self-destruct, initially at least. Thereafter, if a need for a permanent body is found to exist, I think it could be addressed.

Senator HEFLIN. Your motivation is based upon a subjective evaluation of bureaucracy's intrusion into your judicial life? [Laughter.]

Judge VANCE. Well, it may be that that is an apt description of it. I think I may have had a little more objective view of the total state of the Federal judiciary, however. I am not an alarmist; I do not think it has gotten out of control, but I do feel that it is desirable that administration of the judiciary be kept as lean as possible.

At times, administrative additions to the judiciary have done wonders. An enlarged administrative apparatus did wonders in my home State, as you well know; you created it. There it has been a wonderful thing and I am in no respect critical of it. But I think that there is a tendency for administrative bodies to grow, and in the judicial area they serve no useful purpose except to provide minimum administrative support for that branch of Government. I would always strive to keep them at the lowest level possible.

Senator HEFLIN. I am going to ask Mr. Williams, if he will now, to give his testimony and statement and any comments he would like to make.

Mr. WILLIAMS. Mr. Chairman, with your permission, I would incorporate by reference the statement that has been provided earlier.

I associate myself with the comments that have been made here earlier in large part. I would like to underscore what I said briefly at the time of the recess, and that is that there is a body of experience that is available to us that tells us how court improvement has been carried out in the States.

While I realize that the situation may not be always applicable or that the experience is always transferrable, I am particularly delighted, as I know others undoubtedly are, at the wisdom in 1530 of writing into that bill a way in which the Conference of Chief Justices has an opportunity to exchange ideas and experience in terms of the commission.

One of the factors that I would hope would be very much in the mind of those charged with implementing this legislation would be the special role that citizens can play, because I think one of the experiences that we have had where court improvement has been successful at the State level has been the leadership of those who are not necessarily tied in directly with the court system, but for whom courts exist in the final analysis.

Strong citizen understanding, strong opportunities for citizen awareness, and strong opportunities for citizens to voice their con-

cerns and expectations have been the things that, in large part, have helped to provide the initial momentum, and frequently to sustain that momentum in the experience of the States. And I would hope that that same factor would be much in mind in conjunction with the present legislation.

[Prepared statement of George H. Williams follows:]

STATEMENT

OF

GEORGE H. WILLIAMS

EXECUTIVE VICE PRESIDENT and DIRECTOR

AMERICAN JUDICATURE SOCIETY

The American Judicature Society appreciates the opportunity to submit a statement in support of S.1530, a bill to establish a Federal Courts Study Commission and a Federal Courts Advisory Council on the Future of the Judiciary.

The American Judicature Society is a nonprofit organization with a membership of over 30,000 lawyers, judges and citizens who are committed to the effective administration of justice. Since its inception in 1913, the Society has advocated a platform for improvements in the administration of justice, including selection of judges on the basis of personal and professional merit, judicial accountability, court unification and increased citizen understanding of the role of the courts and the judiciary.

One important element of the Society's platform for court improvement is the encouragement of instrumentalities to stimulate continuing study of various aspects of the justice system. As early as 1923, we supported the creation of the American Law Institute, which provides valuable analysis and recommendations for change in substantive law. In 1939 we pressed for the formation of the rules committee of the Supreme Court which brought uniformity to federal procedural law. During this same period the Society encouraged the states to establish judicial councils, which became catalysts for change in their courts. More recently we have supported the establishment of the Institute for Court Management and the National Center for State Courts which have worked to improve the management and administration of the courts.

The theme that runs through all these activities is the creation of a forum to study, debate and implement policies directed at the improvement of the administration of justice. S.1530 is in keeping with this tradition.

A paramount problem that confronts our federal courts is the specter of rising caseloads. In 1978 Congress sought to address the problem with the passage of the Omnibus Judgeship Act which provided 152 additional judges. Despite this significant increase in judicial manpower, federal court caseloads continue to climb

at an alarming rate. The filings in the United State District courts have grown from 136,000 in 1971 to 201,000 in 1981. The Omnibus Judgeship Act brought some temporary reduction in filings as they impact on individual judges (from 417 to 344). However, that number increased to 390 in 1981.

The caseload in the United States Courts of Appeals is even more alarming. The filings have more than doubled in the last ten years (from 12,000 to 26,000). The filings per judge has grown from 132 to 599. It is clear that additional judgeships, absent other changes in our federal system, will provide only temporary relief.

S.1530 represents an important step toward a comprehensive program aimed at improving the administration of justice in the federal courts. In the past, changes have been made in a piecemeal fashion. The proposed Study Commission and Advisory Council can provide an overall sustained approach to assessing all available information on the courts and determining the need and character of additional study. With adequate resources the Commission should be able to provide Congress with information necessary for appropriate action for easing the pressure on our federal courts.

Through S.1530 Congress will establish a means by which the entire federal system can be studied and a blueprint for the future developed. It will provide a permanent mechanism for the collection, analysis, and dissemination of research on all aspects of our courts. The Permanent Federal Courts Study Act will focus on the activities of such court improvement organizations as the American Judicature Society, the Federal Judicial Center, the American Bar Association, and the National Center for State Courts. From the individual consultations of these organizations and others, the Federal Courts Advisory Council on the Future of the Judiciary and the Federal Courts Study Commission will be able to develop a broad program of constructive change designed to relieve our overburdened federal system.

The need for this legislation is undoubted and timely. While this proposed legislation addresses the special problems of the Federal Judiciary, it is important that close liaison be maintained with such organizations as the Conference of Chief Justices and the National Center for State Courts. Exchange of experiences and ideas in this way has the potential for benefiting both the federal and state systems.

Senator HEFLIN. Thank you, sir.

Professor Abernathy, we would be delighted to hear from you now.

Professor ABERNATHY. Thank you, Senator. I spent 5 years in Alabama in the early 1970's, and I find that I must have become more of an Alabamian than I realized because I find myself drawn by two distinctive statements said here today both by yourself and Judge Vance.

It seems to me, on the one hand, one of the sets of problems that we face here is not a problem with courts at all, but with laws. There are simply too many laws for courts to enforce, and one of the problems we may have to look at in this entire area is not changing or reforming courts, but changing and reforming the way we make laws and enforce laws through courts.

On the other hand, I agree completely with the idea that courts need to be reformed. No matter how well courts are working, they can always work better. I appeared at an ABA conference this last week in Florida with Judge Tjoflat from the fifth circuit, and eleventh circuit now, and he was saying exactly the same things that Judge Vance has said here today; that the judiciary is already bureaucratized. Judge Tjoflat was expressing his camaraderie with other members of the audience there who were complaining about the Federal bureaucracy. He said that his own department had become a bureaucracy.

I can also think back historically to the 1801 judges bill, when Congress added a number of additional Federal judges and raised the number to something like 20 or 25. The very next year, Congress repealed the act, and one of the Senators stood up and said, "There will never come a time in this country when we will need 25 Federal judges."

I think that we have grown larger than that size today, and it may be time to do something to solve the problems associated with growing large.

Senator HEFLIN. There may be people who agree with that statement.

Professor ABERNATHY. I realize that. [Laughter.]

The main difference between S. 675 and S. 1530 is that the first provides for a temporary study commission, and the second provides for a temporary and permanent commission or council.

I would like to simply be more reserved than the other people who spoke here today in terms of the benefits that can be expected from these bills. I have already noted the bloated bureaucracy that we have in the area of jurisdiction. Footnote one of the written statement that I handed in lists the 27 judicially oriented bodies which deal with this topic. We also have the chief justices of the States; the ABA-ALI; the Library of Congress; and, of course, absolute hoardes of law professors who tend to write in this area.

I think the main difference that can be expected from the commissions to be established by these bills, if you look at the way that the members will be appointed, is that these will be, more or less, political bodies. I do not think that that is a bad idea. I use political in the good sense. All ideas must be gotten through Congress some way in the end, and this way is one of the ways of doing it.

I would simply like to point out that the experience with these kinds of groups has not been as well as we would hope. You perhaps are aware of the experience we have had with the study group for the consideration of the alteration of the west front of the Capitol—a group which is made up primarily of politicians around Capitol Hill that has been very ineffective.

We also have less political bodies which, even though they have done excellent work and compiled excellent study records, have not been successful at getting their suggestions through Capitol Hill. The Freund Commission and the Hruska Commission are examples of those. The eleventh circuit was the greatest accomplishment of those commissions, and while that was a great accomplishment, there were certainly a lot of other things recommended that did not take place.

Chances are, with these commissions we can expect the same things that we have had in the past. The political persons whom we most want to get involved will not have time to participate, and we will basically have the same old issues being raised over again—national court of appeals abolition of diversity, elimination of the Supreme Court's obligatory jurisdiction, and the issues which the Washington Post labels "the new right"—issues relating to jurisdiction limitations on Federal courts.

The most effective studies in this area have been things like the Attorney General's report of just last year and a few years ago which led to the requirement of exhaustion of remedies for prisoners, and things of that nature. There are other study groups which do have enviable records.

I am especially dubious about S. 1530 and its permanent council, just as Judge Vance is. Of course, one of the problems is the problem of a permanent bureaucracy. I do not think we can expect this group, however, to duplicate the work of the Administrative Office of the U.S. Courts. It is likely to be a more political body, just as the commission is designed to be political.

Even considering it as a political body, I have a major reservation, and that is the terms that are set up. Anytime we create a permanent body, there will have to be some permanent way to staff it. S. 1530 provides for 5-year terms for members of the commission.

The greatest problem I see with this is that there is a possibility—in fact, a severe probability—that the members of the permanent council who are members of the legislative bodies on Capitol Hill will lose their terms on Capitol Hill before they will lose their terms on the commission. The commission may, in the final analysis, turn out to be an area or a platform from which ousted politicians may speak, rather than a location where current politicians may educate their brethren and become better educated themselves on these kinds of issues, so I see some problems.

It may be better that we simply establish short-term commissions from year to year. That seems to be what we have done over the last 15 years with the Freund Commission, the Hruska Commission, and now this commission, which I assume will be inaugurated in some position. I think that may be the better course.

I also have some technical and substantive reservations. I mentioned the technical ones in the written statement which I have

given the committee. Some redrafting needs to be done with S. 1530, in particular, I believe.

There is one substantive problem with both of the bills that I would like to draw to the committee's attention, and that is the problem with the subpena power that is given. The subpena power given in these bills is extremely broad, covering a great range of material and a great range of persons who can be called before the council and the commission.

Now, as I reviewed this earlier, I think what we can legitimately expect here is that these will not be study commissions in the sense of going out and doing original, independent research. It seems to me in that regard it is very unlikely that subpenas will be necessary in order to obtain primary resources.

It seems to me in this regard also that there is already a provision in both of the bills requiring that Federal organs give official data to the commission and the council, and I do not see that there will be any need for use of the subpena power in that regard. It seems to me that State court judges and private practitioners, if anything, would be more than happy to help out the commission and the council with their materials.

On the other hand, I think there is a substantial possibility—I do not expect witch hunts these days, but a possibility that the subpena power could only be used to go after those persons who have records or views which the commission has not been able to gather voluntarily and wants to hear about. We could, for example, see the possibility of hauling persons before the commission or the council and asking them to reveal the reasons why they choose Federal courts over State courts, or to call groups before the council or commission to ask them why they litigate and what they plan to litigate in Federal court.

In light of the very, very slight need there is for the subpena power in general, I think even the slightest possibility of personal abuse outweighs the need for the subpena. So, I would cut back the subpena power quite drastically.

Also, the geographic reach of the subpena power is much wider than that provided even in Federal civil litigation. The provisions, as I have noted in my written comments, would permit the commission or the council to call persons to Washington or to any place they sit. That is far beyond the reach of rule 45 of the Federal Rules of Civil Procedure, and it would seem to me ironic if we allowed a group studying the problems of the Federal courts to use more drastic and more intrusive powers than even the Federal courts themselves have.

If I were to recommend things here, I would follow Judge Vance's recommendation that there be no permanent commission or study group. In light of the 5-year terms problem and the possibility of having political outs control the group, it seems to me much more preferable to have Congress simply involve itself with a new commission on a basis as it sees fit—every 2 to 5 years, as it has in the past.

Finally, I would like very much to encourage the committee, to the extent it feels possible, to become involved in this area the same way it has in the criminal code area. There is simply no sub-

stitute for the Senators and the Representatives themselves to become involved very closely.

I think we cannot have these commissions and councils where, quite frankly, Senators and Representatives show up after a briefing by their staffs and sit in for a short time. Those commissions will be controlled by the executive directors and the staffs. Instead, since what we need here is real political input, we need an effort here just as we have seen on the criminal code. It will take several years, as it has there, but the results will be much more worthwhile. Thank you.

[Prepared statement of Prof. Charles F. Abernathy follows:]

Testimony of

Charles F. Abernathy
Associate Professor of Law
Georgetown University Law Center
Washington, D.C. 20006

Mr. Chairman and Members of the Committee:

The committee is considering two bills which would lead to new studies of the division of jurisdiction between federal and state courts. S. 675 would establish a temporary "Federal Jurisdiction Review and Revision Commission" and authorize it to conduct such a study for only two years and to submit a report of its conclusions. S. 1530 would establish both a temporary "Federal Courts Study Commission" and a permanent "Federal Courts Advisory Council on the Future of the Judiciary" and give them overlapping authority to study federal jurisdiction, the former to file a report in two years upon its demise and the latter to conduct ongoing studies and reports.

I do not plan an impassioned plea against these bills. Few can argue against studying a problem. But I find the projected benefits of these bills dubious. And the projected shortcomings of S. 1530 should cause all of us some concern.

## I. DUBIOUS BENEFITS

### A. Redundancy, Inefficiency, and Lack of Results

The study groups established by S. 675 and S. 1530 would add redundancy to an already bloated bureaucracy studying federal jurisdiction. At the federal level we currently have at least 27 organs which study or report on or discuss federal jurisdiction.[1] Two other prominent bodies--this Committee and its counterpart in the House of Representatives--also study and discuss federal jurisdictional issues. The states' Supreme Court justices also meet from time to time with this topic on their agenda,[2] and there are, of course, multiple independent sources of study from the unbiased experts at the Library of Congress Congressional

Research Service to those of the American Bar Association and even law professors.

The answer to this criticism, I suppose, is that study organs proposed here would be different because of their political character. Since appointments would include Senators and Representatives as well as agents of the Executive and Judicial branches, these proposed organs would be capable of forging a compromise which might lead to significant legislative action. This view must frankly recognize that no original "study" will be conducted by the study organs; rather they will analyze and synthesize the work of others, and that itself will be a substantial task to complete in two years.

The productivity of such politically oriented study groups, however, should not lead us to expect great things from the bodies new proposed. The similarly constituted Commission for the Study of the West Front of the Capitol has a singularly confidence-sapping record. Previous similar efforts on this very topic of federal jurisdiction have also produced what can only be called negligible results, as shown by experience with the Hruska Commission and Freund Commission in the 1970's.[3]

The most that can be said for the temporary study groups proposed in S. 675 and S. 1530 is that they will add another voice to the cacaphony already speaking on this issue. And the same tired old topics will surface once again--an intermediate national court of appeals, the abolition of diversity jurisdiction, the elimination of the Supreme Court's obligatory jurisdiction--together perhaps with a new round of old arguments about federal court rulings on abortion, busing, the exclusionary rule, and school prayer. The minimum of one million dollars ($1,000,000) necessary to conduct the proposed "studies" could, in these austere times, be better spent.

B. The Special Problems of S. 1530

Whereas S. 675 would follow the tradition of authorizing

only a short-term study commission, S. 1530 would go further and establish a permanent "Federal Courts Advisory Council on the Future of the Judiciary." It might be said that the permanent Council would provide for the possibility of original study and analysis which is impossible during the brief two-year term of the Commission. But the appointment process for the two bodies is substantially the same, and the Council, therefore, will doubtlessly share the strong political qualities expected of the Commission--evaluation, compromise, and cajoling, not originality in research. Moreover, to the degree that professional staff engages in original work they will only needlessly replicate the work of the Administrative Office of the United States Courts and other bodies.[4]

More importantly, however, making the Council permanent renders some of the innocuous features of the temporary body very worrisome. Foremost among these is the term of appointment, which S. 1530 fixes at five years. Since the terms are not coterminous with those of Congress, there undoubtedly will be periods when the membership of the Council is out-of-step politically with the Congress. Since political promotion has been such bodies' major traditional asset, it seems to me unacceptable and counter-productive to establish a power base from which rejected politicians can speak out against their successors. That makes compromise less likely rather than more likely.

The problem of bureaucracy also becomes more troublesome when the study group is made permanent. Section 4(c) of S. 1530 enpowers the Council to hire "an Executive Director, and such additional staff as he deems necessary" and "to procure temporary" consultants to aid the Council. Under a two-year Commission, dramatic expansions of staff seem unlikely, but even a small permanent staff would compromise three-to-five professional persons and at least as many support personnel. At

perhaps two-or-so million dollars per year the job could be cheaply done--but few constitutes would consider that a paltry sum.[5]

II. Substantive and Technical Reservations

If the Committee proceeds to act on these bills some perfections seem necessary to cure drafting defects. The Council under S. 1530, for example, may only serve subpoenas (§ 4(a)), request official data (§ 4(b)), and hire personnel (§ 4(c)) through its Chairman on Vice-Chairman. Yet the bill, although it creates such positions in the Commission (§ 3(f)), nowhere authorizes such positions in the Council.

It would also seem wise in S. 1530 to provide some means for eliminating conflicts between the authorities of the Commission and the Council during the first two years when both are in existence. Perhaps the Council should have no investigative authority until the Commission files its interim report and no recommendatory or decisional authority until after the Commission's final report. Something like this would seem helpful, lest Congress be required to appoint a commission to study the division of jurisdiction between the Commission and the Council.

These technical suggestions pale when set against two substantive problems created by both pieces of legislation--the vesting of the subpoena power and the geographical scope of its use. Both S. 675 and S. 1530, in virtually identical language, provide substantial subpoena power and effectively permit it to be used at any location, even one far from the home of the party served.

I suspect that the drafters of the bills provided for subpoena power almost perfunctorily: a body carrying on an investigation needs power to assemble facts. But at least three factors argue for a major curtailment of subpoena power in this context.

1) As noted above, the study groups proposed here are not likely to do original research, but rather will collect and evaluate the work of others. There is no reason to foresee the need for traditional investigatory proceedings in which subpoenas will be necessary.

2) To the extent that research and primary data are necessary, they will more than likely come from federal agencies that already compile data on federal court activities. Both bills already require federal agencies to share this data. Other studies are available in publication, and state agencies will probably also be happy to meet reasonable requests for information. There is, in short, virtually no demonstrable need for coercive subpoena power.

3) Finally, the potential for abuse of the subpoena power, with respect to private individuals, is very real. Given the ready availability of adequate governmental and private studies of courts, the most foreseeable use of the subpoena power would be to interrogate private attorneys or parties, or to search their papers, concerning why they used federal courts rather than state courts. Many would be pleased to testify without subpoena; virtually all would resent and claim a privilege from being compelled to disclose their reasons in particular cases. While I do not expect witch-hunting these days, there is always a potential for even good faith investigations to become overzealous, and with the permanent council envisioned under S. 1530 we could even one day see active abuse of the power.

Not only is the subpoena power unnecessary, it is also too liberal in its geographic scope. Both bills provide that a subpoena may be enforced in any district (a) in which the party served resides (or is found or conducts business) or (b) in which the inquiry is being carried on. This means, under the latter clause, that all persons could be summoned to Washington, D.C., or to any inconvenient location far from their homes upon threat of contempt. This geographic reach is far broader than that provided in normal federal civil litigation.[6] It would be ironic for a body considering ways to limit the onerous nature of federal litigation to exercise itself powers more onerous than those of the courts under study.

## III. Recommendation and Conclusion

S. 675 can do no great harm, particularly if its provisions concerning subpoena power are narrowed substantially. Short-

term, political study groups have become traditional, and even if they do not have an effective record of successful instigation of change, neither do they have the reputation for excess seen in some permanent bodies. S. 1530's permanent body should be rejected because of its bureaucratic redundancy, its unnecessary expense, and its potential, in both subpoena abuse and in staggered terms of service, for political obstruction and infighting rather than compromise.

FOOTNOTES

1. See, e.g., 28 U.S.C. § 331 (Judicial Conference of the United States), § 332 (twelve Judicial Councils of the circuits), § 333 (twelve Judicial Conferences of the circuits), §§ 601-11 (Administrative Office of the United States Courts), §§ 620-29 (Federal Judicial Center).

2. See The Conference of the Chief Justices, Resolution I (January 20, 1982) (opposing attempts to restrict federal jurisdiction in cases involving constitutional rights).

3. See P. Bator, P. Mishkin, L. Shapiro, and H. Wechsler, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 2-6 (1981 Supplement).

4. Cf. note 1 supra.

5. If this body is to pursue political goals rather than merely overlap the efforts of the Administrative Office of the United States Courts, it would be far less expensive to achieve similar results by expanding the permanent staff of this Committee.

6. See Fed. R. Civ. Pro. 45(d)(2), 45(e)(1).

Senator HEFLIN. Thank you.

Mr. Williams, you are with the American Judicature Society, and the American Judicature Society has been very effective over a number of years in improving the administration of justice. They have participated in establishing blueprints, and I think that we really here are talking about a method or procedure to establish a blueprint, an architectural approach, toward the problems of the judiciary. Second, how do you prevent shelving of the blueprint, which everybody has criticized? It gets on a shelf and nothing is ever done.

I might say that even the criminal code, while it has gotten out of committee on a couple of occasions, still has been languishing now for 10 or 15 years in its efforts.

You, of course, have brought out the participation by lay people in regard to it being the consumers of the products of the judiciary. Do you have a feeling that if a blueprint is established, there ought

to be some type of a continuing mechanism to either change or alter the blueprint and to prod for the adoption of it?

Mr. WILLIAMS. Very clearly, Mr. Chairman, it seems to me that the purpose of the blueprint in the final analysis, whether it be of this character or whether it be a blueprint for the future of another institution such as a college or a university, is that, as a point of departure, it invites attention to the way in which it can be addressed, updated and corrected.

A blueprint is not—and I take it it is no different here—trying to freeze anything into position, but it does give a point of reference that some permanent body with a sense of responsibility, can use in order to address and to measure the advance or the failures or the shortcomings of the system against some known and agreed-upon blueprint or position.

So, I think well both of the continuity notion and, as well, of the commission that addresses and puts together the kind of blueprint which gives meaning to a system that serves as a point of departure for future discussions and change.

Senator HEFLIN. In your observation, in the States there has been a movement—a great deal of it generated by the LEAA funding that went on to update and to make blueprints, and then to go forward with implementation. I do not think anybody has ever adopted the full blueprint, but there has been some adherence.

What, basically, do you see, as the improvement occurred in the States outside of the funding and the help that LEAA gave, as being the impetus for it? What, in effect, were the reasons why there has been this generally acceptable and generally good movement toward court modernization in the State courts?

Mr. WILLIAMS. I think, really, there are three factors that I would be inclined to mention. One is that it was frequently under those auspices that it was possible to assemble a cross section or representation of citizens of a given area; not just judges, not just lawyers, but a pretty full spectrum were brought together to take a look at the way in which the system was working or not working.

Thereafter, the momentum that carried on for a bit provided the support and continuity that was not always provided for in other ways. One of the unfortunate results, I think, that we are seeing now either results from the decline of LEAA or similar support, or the apathy into which I am afraid too many of us drift when the system is working better than it formerly worked, but perhaps not quite as good as it did when it reached its highest point.

Senator HEFLIN. In a study commission, is there an advantage to a three-branch approach with, of course, lay participation in it?

Judge Wallace, you have come up with the idea of a study commission being representative of the three branches. While Professor Meador mentioned the American Law Institute, there probably was nobody, in effect, who put the ideas of the Department of Justice in.

The closest thing we have had to my idea of a three-branch approach is this Brookings Institute 2-day seminar that we have annually. Unfortunately, no more than half of the Members of Congress ever attend because they have got competition for their weekends back in their States or from something else.

But you feel fairly strongly that the three-branch makeup of a commission and/or a council is essential?

Judge WALLACE. I think it is important; whether it is essential or not, I do not know. But I do not envision long-term solutions to problems without all three branches being involved. The difficulty I see with other types of studies—and I do not minimize the great work that has been done—is that we have not had the three branches involved. And the buck really stops when all three branches are working together. Thus, it seems to me, a three-branch partnership is needed to accomplish what is necessary for future judicial needs. So, I believe it to be a very important part of the bill, and hope that it stays in.

Senator HEFLIN. Mr. Pete Velde is here, who is the chief counsel of the Subcommittee on Courts. Mr. Velde has a long career in the LEAA as an administrator. Mr. Velde, would you like to ask some questions of the panel?

Mr. VELDE. Well, thank you, Mr. Chairman. I would address one question to Professor Abernathy.

There have been other examples of commissions and groups active in the criminal justice field that you have not referred to. The National Commission on Reform of the Federal Criminal Code, which was established by Congress in 1966, worked for 4 years and produced a model draft code, and the Congress has been struggling with it since 1970.

That is certainly not the fault of the commission, but one of the important benefits of that commission was that it provided a model for a form of other criminal codes, not just Federal. In fact, a number of other national governments have adopted a code based on the work of that commission, as well as a number of State governments.

The National Advisory Commission on Criminal Justice Standards and Goals, and particularly its courts task force, did work in the mid-seventies which resulted in, I think, some fallout or benefit to the Federal judiciary indirectly, as well as the primary focus that was directed toward reform of State courts.

There are a number of ways to organize groups of people and resources and efforts to focus long-term on substantial, difficult problems, such as the future of the Federal judiciary. I cannot think of any really good examples where the Congress has been able to focus on these kinds of issues over a sustained period of time and by itself.

The work of the Immigration Commission—the Senate Judiciary Committee is now trying to come up with a revision of those laws based on that work. A similar commission, 2 years ago, made a comprehensive set of recommendations on reform of the antitrust laws. This is work which Congress and its staffs simply did not have the expertise to tackle themselves.

That is kind of a long preface to the question, but it seems that these commissions do provide resources and collections of people who are interested in the problem, and recommendations that then can be translated into action by the Congress.

I just wonder if you have any experience with commissions that are not all bad.

Professor ABERNATHY. We have had quite a few commissions in this area already—the Freund Commission, the Hruska Commission. The ALI study on the division of jurisdiction between Federal and State courts took 8 years. They provided us with a blueprint in 1969 that is virtually identical to most of the proposals going around today on abolition of diversity jurisdiction, for example, and limitation on Federal court jurisdiction.

One of the things we do not have in the area of jurisdiction is a lack of ideas. What we have is a lack of consensus, and I do not really foresee this kind of commission as being as great an organ for achieving consensus as some other organ.

The last time we reformed the Federal civil judicial code in 1948, it was done in Congress in 3 years.

Mr. VELDE. Was that not recodification as opposed to reform?

Professor ABERNATHY. Well, all of these are recodifications. There was a code which preexisted which was a hodgepodge of laws, and it was a substantial problem.

What usually happens in all of these areas, beginning with the first revision of the entire Federal code back in the 1870's, is that Congress always appoints an outside commission to help itself along and do some work in the area. I think what we have reached in the area of Federal civil jurisdiction that we are talking about here is that we have quite a few studies. We do not have any lack of study and imagination and thoughtful ideas; those are floating around to the greatest degree.

We do not have, really, any shortage of facts; we have a great number of bodies which are gathering facts today. What we lack is the consensus to go ahead and achieve some different result. So long as there is no consensus, we are not going to change things, except in the bits and pieces that we have seen, for example, in the Magistrates Act.

Mr. VELDE. Well, to paraphrase a famous expression, if it is not broken, do not fix it. Is that how you would characterize the state of the Federal judiciary at the present time, that we really do not need to think in long-range terms or look down the road as to what workloads might be 5, 10 or 20 years from now?

Professor ABERNATHY. No. I would say just the opposite. It has defects, and the trouble is that 1,000 mechanics have shown up with wrenches and everybody wants to get at it first. Everybody has got an idea; everybody has got a new wrench; everybody has got a different way of doing it. What we need now is some group—and I suggest it is really the legislature itself by now—who will help us form a consensus.

I really do not object to a commission, especially if we can get all three branches involved, especially the legislative branch. But I just do not hold out the highest of hopes until the legislative branch really itself gets involved.

As far as a long-term council, I do not think that has a great educational value, especially given the problems of having legislators attend and the 5-year term problems. I would love to see this bill passed. A lot of my students need jobs, and a permanent council would be terrific in that regard.

Senator HEFLIN. I see Dr. Mark Cannon back there. We would be delighted to have you make any statement or ask any questions, Dr. Cannon.

Dr. CANNON. Thank you, Senator Heflin; just a brief comment.

First of all, the assertion has been made that these earlier commissions did not have any of their recommendations enacted, and I do think that the record should show that the Congress action in substantially eliminating three-judge courts did stem in part from these commissions, and that it is questionable whether that very important advance for the Supreme Court and the Federal judiciary would have been achieved—it might have, but it might not have—without that kind of endorsement and legitimization of thoughtful people.

Now, the second point—and I do not have any strong position on these bills—but the second point that the professor has been making is what we need is consensus. Well, it seems to me that that is a concept that is involved in having the three branches involved. It would be great if Congress would dig deeply into these issues, but the history is that these issues do not have the political saliency that commands the top-level attention of very, very busy Congressmen and Senators, with a few exceptions such as yourself.

Senator HEFLIN. I can hardly find time to do it myself; that is the problem.

Dr. CANNON. And you are a person with an enormous background and a keen interest in this subject. So, at least the goal, whether it turns out to work or not, is that here would be a mechanism to have a council, whether you made it permanent or made it for 5 or 10 years on an experimental basis, which would, in fact, get these people together and would periodically, hopefully, achieve some consensus in certain areas that then could be fed back into the system.

I would like to just add to this that my observation of the Hruska Commission, which did have Senators and House Members sitting on it, was somewhat as the professor described, in that the Senators and House Members did not have a lot of time to devote to it.

Nevertheless, the fact that they were involved was important in their own involvement, education and feedback to their committees. So, I think there were very positive results by the fact that they were involved, despite the limitations on their time. Thank you.

Senator HEFLIN. Mr. Velde, do you have any other questions?

Mr. VELDE. Not right now. Thank you, Mr. Chairman.

Senator HEFLIN. Well, thank you. We appreciate each of you being here and your testimony. If any of you wants to add anything else in writing, the record will be kept open. Chairman Thurmond was going to come and be here today, but he had other duties, and his statement will be entered into the record.

Senator HEFLIN. The record will remain open for any additional statements that any Senators or any of you would like to make, if you will send them in.

Thank you very much; we appreciate it.

Judge WALLACE. Thank you, Senator.

[Whereupon, at 12:17 p.m., the committee was adjourned.]

[Prepared statement of Chairman Strom Thurmond follows:]

PREPARED STATEMENT OF SENATOR STROM THURMOND (R-S.C.), CHAIRMAN, SENATE COMMITTEE ON THE JUDICIARY

Today the Committee on the Judiciary will examine proposals to establish a Commission to study the jurisdiction of the Courts of the United States. Senator Heflin has been kind enough to preside over the hearing before the Full Committee and I commend him for his interest in this area. I further wish to thank Senator Heflin for taking the time from his busy schedule to hear the testimony from our distinguished guests.

There are two bills which are the subject of the hearing today. I introduced S. 675, which provides for the creation of a Commission to study the jurisdiction of the Courts of the United States and of the several States for a period of two years. S. 1530, introduced by Senator Heflin, would establish a permanent Federal Courts study Council and a temporary Commission to advise and make recommendations to the Council. Both bills seek to review the function and effectiveness of the Courts and provide a report on any recommended revision of the Constitution or laws of the United States.

I introduced S. 675 because I believe that the legal system in our country is approaching a crisis through the growing confusion of jurisdiction between State and Federal Courts. The 10th Amendment to the Constitution has been ignored by the Congress which has enacted over 70 new statutes in the last decade expanding the jurisdiction of the Federal Courts. If greater deference were paid to the 10th Amendment, much of the Court mandated misery and social dislocation we have brought upon ourselves could be avoided.

The proposals in S. 675 mandate that the Commission study the relationship between the Federal and State Courts. While I am not wedded to this proposal, I do feel it is important that should a Commission or Council be established, it be specifically directed to study the encroachment on State Court jurisdiction by the Federal Courts. As State Courts surrender more and more jurisdiction to the Federal Courts, traditional concepts of federalism are eroded.

The measures embodied in S. 1530 would establish a permanent Federal Courts Advisory Council to oversee Federal court jurisdiction review and proposed revisions. I feel that these are commendable proposals and I thank Senator Heflin for bringing them to the attention of the Committee.

I compliment Senator Heflin for his concern respecting this matter and his graciousness in presiding over the hearing today. I also thank all of our prominent guests for taking their valuable time to share their thoughts and expertise with the Committee on this important issue.

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